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IN THE

Supreme Court of the United States

October Term, 1964
No. 648

DEPARTMENT OF FISH AND GAME of the STATE OF CALIFORNIA,

Petitioner,

vs.

FEDERAL POWER COMMISSION; PACIFIC POWER & LIGHT CO.,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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DEPARTMENT OF FISH AND GAME of the STATE OF CALIFORNIA,

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FEDERAL POWER COMMISSION; PACIFIC POWER & LIGHT CO.,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Petitioner, the Department of Fish and Game of the State of California,[1] prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the Ninth Circuit, entered on June 8, 1964, in *Pacific Power & Light Co., Department of Fish and Game of the State of California v. Federal Power Commission* (Nos. 18853, 18954, in the Court of Appeals for the Ninth Circuit), opinion reported at 333 F.2d 689.

[1]As used herein:
"Department" refers to petitioner Department of Fish and Game of the State of California.
"Commission" refers to the respondent Federal Power Commission.
"Licensee" refers to respondent Pacific Power & Light Co. and its predecessor in interest, California Oregon Power Co. (often called "COPCO"), to whose interests Pacific succeeded in 1961.

Citations to Opinions Below.

The following decisions are set forth in appendixes hereto:

App. A Decree and opinion of the Court of Appeals for the Ninth Circuit in *Pacific Power & Light Co., Department of Fish and Game of the State of California v. Federal Power Commission,* 333 F.2d 689.

App. B Opinion No. 381 of the Federal Power Commission, *Pacific Power & Light Co., Project No. 2082;* issued March 14, 1963, 29 F.P.C. 478.

App. C Opinion No. 381-A (on rehearing) of the Federal Power Commission; issued August 19, 1963, 30 F.P.C. 499.

Jurisdiction.

The decree and opinion of the Circuit Court of Appeals were filed on June 8, 1964 [R. 522, 508-21 (app. A hereto)]. The Department's petition for rehearing, which was served and filed July 7, 1964, was denied on August 6, 1964 [R. 523]. The jurisdiction of the United States Supreme Court is invoked under 28 U.S.C. § 1254(1) (1958).

Questions Presented.

Section 10(a) of the Federal Power Act (41 Stat. 1068 (1920), as amended, 16 U.S.C. § 803(a) (1958)) requires that all licenses issued by the Commission shall be on condition that the project shall be such as in the Commission's judgment

> "will be best adapted to a comprehensive plan for improving or developing a waterway . . . for . . . beneficial public uses, including recreational purposes . . . ."

Section 10(a) further provides that if necessary to secure "such plan," the Commission shall have authority to require modification of the project and of the plans and specifications of the project works before approval.

The following questions are presented:

1. With respect to operation and maintenance costs for the *fish hatchery facilities* that the Commission has required Licensee to construct at its sole expense at Iron Gate Development pursuant to section 10(a) of the Federal Power Act:

a. Must the Commission require Licensee to bear the operation and maintenance costs for all, not just a part, of the capacity of those fish hatchery facilities, regardless of whether Iron Gate's stream regulation would cause any increase in fish population over natural conditions?[2]

b. Is there substantial evidence in the record:

(1) That any destructive natural fluctuations or changes in river levels would occur under natural conditions?

(2) If so, that the reduction or elimination of any natural fluctuations or changes in river levels by Iron Gate's construction and operation would result in an appreciable increase in the fish population of the Klamath River?

2. With respect to operation and maintenance costs for the *fish trapping and egg collecting facilities* that

[2]We do not object, and have never objected, to paying that small portion of the operation and maintenance costs for fishery facilities at Iron Gate that the Department has voluntarily agreed to bear, namely, such costs for 19 percent of king salmon eggs up to 15,800,000 annually and for all king salmon eggs in excess of 15,800,000 annually. For a fuller explanation, see note 7 *infra*.

Licensee had agreed to construct at its sole expense, and that the Commission required at Iron Gate pursuant to section 10(a) of the Federal Power Act:

a. Did the Department by a 1959 agreement with Licensee, approved by the Commission, impliedly agree to pay for all operation and maintenance costs for those fish trapping and egg collecting facilities? (The Court of Appeals answers in the affirmative, the Commission in the negative.)

b. If the Department did not so agree, then the same issues are presented by the Commission's decision as to the fish trapping and egg collecting facilities that are present above in question 1 as to the fish hatchery facilities, namely:

(1) Must the Commission require Licensee to bear the operation and maintenance costs for all, not just a part, of the capacity of those fish trapping and egg collecting facilities, regardless of whether Iron Gate's stream regulation would cause any increase in fish population over natural conditions?[3]

(2) Is there substantial evidence in the record:

(a) That any destructive natural fluctuations or changes in river levels would occur under natural conditions?

(b) If so, that the reduction or elimination of any natural fluctuations or changes in river levels by Iron Gate's construction and operation would result in an appreciable increase in the fish population of the Klamath River?

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[3]See note 2 *supra*.

Statute Involved.

The statutory provision involved is section 10(a) of the Federal Power Act (41 Stat. 1068 (1920), as amended, 16 U. S. C. § 803(a) (1958)), which provides:

> "All licenses issued under [the Federal Power Act] shall be on the following conditions:
>
> "(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

Statement.

Basis for Jurisdiction of Federal Court of First Instance.

This is a proceeding to review an order of the Federal Power Commission. The jurisdiction of the Court of Appeals for the Ninth Circuit to review that order, based upon section 313(b) of the Federal Power Act (49 Stat. 860 (1935), as amended, 16 U. S. C. § 825l-(b) (1958)),[4] was invoked by timely petitions filed in

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[4]The first sentence of § 313(b) provides:

> "Any party to a proceeding under this chapter aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the United States court of appeals for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court

that court by the Department (No. 18954) and by Licensee (No. 18853).

By order filed October 25, 1963, the two proceedings were consolidated [R. 495]. By orders filed November 18, 1963, the motion of each petitioner to intervene in the proceeding initiated by the other was granted [R. 504-05].

Geographic Facts.

Licensee owns a series of dams and hydroelectric plants on the Klamath River in Oregon and California, all covered by one Commission license and collectively designated by the Commission as Project No. 2082. 13 F.P.C. 1 (1954); 23 F.P.C. 59 (1960). The developments considered in this proceeding are located in northern California, just below the Oregon border. In downstream order, these developments are called Copco No. 1, Copco No. 2, and Iron Gate. [For map, see 29 F.P.C. at 487 (app. B at 39A), reproduced at 2 Jt.App. 381.[5]] Power developed at these plants is sold interstate [2 Jt.App. 327].

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of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part."

The order under review relates to a licensee that does business in California and has its principal place of business at Portland, Oregon—both within the geographical boundaries of the Court of Appeals for the Ninth Circuit.

[5]The printed record before the Court of Appeals, certified to this Court, is the joint appendix to the briefs of all parties, consisting of 2 volumes; and the pagination of the joint appendix has been used as the pagination for that portion of the certified record. For convenience, "2 Jt.App. 381", rather than "R. 381", is the form used herein to refer to page 381 in volume 2 of the joint appendix.

Historic Facts

The pending dispute, which relates to fishery facilities at Licensee's Iron Gate Development, is the residue of a larger controversy between the Department and Licensee that has continued for more than four decades.

Licensee constructed Copco No. 1 in 1918 and Copco No. 2 adjacent thereto in 1925. Because Copco No. 1 dam prevented migrations of anadromous fish upstream to spawning areas, Licensee constructed and conveyed to the Department the Fall Creek fish hatchery and fish trapping and egg collecting facilities. (Copco No. 2 plant did not further block these migrations.) The Department bore operation and maintenance costs for those hatchery facilities until 1948, when they were discontinued as uneconomic, and for those trapping and collecting facilities until 1963, when trapping and collecting facilities were completed at Iron Gate. [1 Jt.App. 86, 160-63; 29 F.P.C. at 480 (app. B at 23A).]

Copco No. 1 and Copco No. 2 have been operated as peak-load plants, *i.e.*, generating electric power by release of water only during peak demand periods, which caused sudden fluctuations in the river flow downstream--from 200 to 3200 cubic feet per second [1 Jt.App. 83]. The fluctuations killed anadromous fish downstream by stranding them and endangered human life on the river [1 Jt.App. 17-61, 83, 184].

In 1950, the State sued Licensee in the California courts to enjoin those fluctuations as a public nuisance [29 F.P.C. at 480 (app. B at 24A)]. Looking solely to its own financial self-interest, Licensee decided to construct a reregulating dam rather than to change its method of operation in order to abate this

nuisance. [1 Jt.App. 70-71, 192; 29 F.P.C. at 484 n.15 (app. B at 32A).] In 1957, therefore, Licensee petitioned the Commission for authorization to construct Iron Gate Development, about 8 miles below Copco No. 2, to even out the releases from the Copco plants. [2 Jt.App. 322-31.]

In 1959, in order to facilitate the construction of the reregulating dam, the Department and Licensee entered into an agreement which provided, *inter alia* [2 Jt.App. 260-69]: (1) Licensee would construct the Iron Gate Development. (2) As part of that development, Licensee would construct at its sole expense fish trapping and egg collecting facilities, which were to be conveyed to the Department (par. 3). (3) The Department would dismiss the 1950 lawsuit against Licensee, with prejudice. (4) "[T]he right is reserved to all parties hereto to be heard in any future proceedings in regard to fishery facilities, other than the fish trapping and egg collecting facilities referred to in paragraph 3 thereof" [2 Jt.App. 265].

In January 1960, pursuant to Licensee's application and that 1959 agreement, the Commission made its decision and order authorizing Iron Gate Development (23 F.P.C. 59, reproduced in 2 Jt.App. 331-57).

In March 1961, after an application by Licensee, the Commission issued an order amending the license (25 F.P.C. 579, reproduced in 2 Jt.App. 358-66). Article 50, which was added to the license, provided (25 F.P.C. at 581, reproduced in 2 Jt.App. 362):

> "*The Licensee shall construct*, concurrently with the construction of Iron Gate Dam, and thereafter *operate and maintain permanent fish trapping, collecting, holding, and spawn-taking facilities* and ap-

purtenances *at or near and downstream from Iron Gate Dam as may be prescribed hereafter*[6] by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing." (Emphasis added.)

Licensee accepted this amendment to its license without protest [2 Jt.App. 364-66].

Iron Gate Dam and power plant has been completed and is in operation [1 Jt.App. 168-69; 29 F.P.C. at 481 (app. B at 26A)]. The fish trapping and egg collecting facilities have also been completed, and the Department's operation and maintenance of these facilities was undertaken without prejudice as to the issue of who should bear those operation and maintenance costs [1 Jt.App. 120; 29 F.P.C. at 485 n.18 (app. B at 34A)].

The Present Dispute.

Iron Gate, although satisfactorily ironing out the Copco releases, creates a new major problem that is the subject of this proceeding: Iron Gate Dam blocks about 16 miles of spawning grounds in the Klamath River and its tributaries above Iron Gate and below Copco No. 2 (29 F.P.C. at 485, finding (3) (app. B at 36A)). Approximately 57.1 percent of the anadromous fish passing the Klamathon fish counting sta-

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[6][Footnote ours.] The fish trapping and egg collecting facilities to be "prescribed hereafter" include such facilities previously authorized in January 1960 by Article 42 of the license as amended [23 F.P.C. at 72, reproduced in 2 Jt.App. at 355-56]. Nothing in the record shows that, at the time that Article 50 was added to the license in March 1961, such authorized facilities had yet been "prescribed" (*i.e.*, plans and specifications established). *Cf.* app. A at 14A n. 2.

tion, downstream from Iron Gate, would normally spawn above the Iron Gate dam site. [1 Jt.App. 103-08; 29 F.P.C. at 482, 490 (app. B at 29A, 44A); see also app. A at 10A.]

Accordingly, on August 21, 1961, the Department initiated the current proceedings by filing with the Commission a petition praying that Licensee be required to construct, operate, and maintain, or arrange for construction, operation, and maintenance of "all of the said fish rearing facilities on the Klamath River hereinabove referred to" (*i.e.*, the fish trapping and egg collecting facilities under construction and the fish hatchery facilities proposed in the petition) and that the Commission approve the fish hatchery plans submitted by the Department with the petition. [2 Jt.App. 366-69.] Licensee opposed this petition [2 Jt.App. 370-71].

At the request of the presiding examiner, the parties by a stipulation filed in August 1962 agreed to the size of hatchery facilities to be constructed at Iron Gate if such facilities were required by the Commission, the stipulation being without prejudice to Licensee's contention that it is not responsible for construction, operation, or maintenance thereof [2 Jt.App. 378-80].

The Presiding Examiner's Decision.

The examiner's decision, issued November 14, 1962, recommended that Licensee be required to construct the hatchery facilities at its sole expense but that the Department bear the entire cost of operation and maintenance of all fishery facilities (the fish trapping and egg collecting facilities then completed and the proposed hatchery) at Iron Gate [29 F.P.C. at 487-94 (app. B at 39A-53A)].

The Commission's Decisions.

By its unanimous Opinion No. 381, the Commission required Licensee to construct the hatchery facilities at its sole expense. However, the Commission required Licensee to reimburse the Department for only 80 percent of the operation and maintenance costs of all fishery facilities at Iron Gate. 29 F.P.C. 478 (app. B hereto). The Commission's order, as it read, would seem to require Licensee to reimburse the Department for 80 percent of such costs, even though those facilities were being operated at less than full capacity. Thus, to the extent that the Department utilized those facilities, the Commission's decision appeared to impose 20 percent of such costs upon the State of California without its consent, and regardless of the level of operation (100%, 80%, etc.) being utilized by the Department.

The Department's timely petition for rehearing challenged the Commission's decision to the extent that it appeared to impose 20 percent of operation and maintenance costs for all fishery facilities upon the Department without its consent. The Department did not (and does not) object to paying such costs to the limited extent that it had voluntarily consented to bear such costs for a portion of the king salmon species only.[7] [2 Jt.App. 421-30.] Licensee also petitioned for rehearing [2 Jt.App. 412-21].

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[7]The State has voluntarily consented to bear operation and maintenance costs of Iron Gate fishery facilities that may be incurred for all king salmon eggs taken at Iron Gate over 15,800,000 annually, and 19 percent of the quantity up to 15,800,000. The State has *not* agreed to bear any costs with respect to (1) 81 percent of the king salmon eggs up to 15,800,000 annually; or (2) species other than king salmon (*i.e.*, silver salmon and steelhead trout). (We believe that there is no disagreement among the parties about the extent of this voluntary undertaking by the State.)

The reason the State agrees to pay operation and maintenance costs with respect to king salmon eggs over 15,800,000 annual-

In its sharply divided Opinion No. 381-A on rehearing, the Commission revised its findings and order only insofar as there was omitted, inadvertently, a proviso in the stipulation specifying the size of the hatchery. 30 F.P.C. 499 (app. C hereto).[8]

The Decision of the Court of Appeals.

In its petition to the Court of Appeals to review the order of the Commission, the Department prayed for the following relief [R. 492-93]:

To amend the first sentence of Article 50 of the license as set forth in Opinion No. 381 [29 F.P.C. at 486 (app. B at 38A)] as follows (additions shown by emphasis, omissions shown by strike-out):

> "Licensee shall reimburse the State of California Department of Fish and Game for ~~80 percent~~ *all* of the combined annual cost of operation and mainte-

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ly, and 19 percent of the eggs up to that quantity, is that the State historically paid operation and maintenance costs of the now abandoned Fall Creek facilities and the facilities substituted since Fall Creek's abandonment. (See p. 7 *supra*.) To compensate for loss of spawning grounds above Copco dams, not at issue in this proceeding, Fall Creek handled about 3,000,000 king salmon eggs per year. (This is 19 percent of 15,800,000.) Fall Creek facilities did not preserve the silver salmon and steelhead trout runs eliminated by the Copco dams. Hence, the State's agreement would relieve Licensee of that portion of Iron Gate's operation and maintenance costs attributable to making up for loss of spawning grounds for king salmon above Copco dams, but it would not relieve Licensee of any portion of costs attributable to making up for loss of spawning grounds for all anadromous fish above Iron Gate but below the Copco dams. Iron Gate would perform some of the function formerly performed by Fall Creek in making up for loss of king salmon spawning grounds above Copco dams; but costs for that latter part of the function have historically been paid by the State and, we agree, will continue to be paid by the State.

[8]Significantly, although all five Commissioners joined in the original opinion, they divided as follows in the opinion on rehearing: Commissioners Swidler and Woodward joined in the

nance of the *fish hatchery*[9] facilities and appurtenances constructed *at Iron Gate*[9] pursuant to Article 49 and of the permanent fish trapping, collecting, holding, and spawn-taking facilities and appurtenances constructed at Iron Gate Dam, *save and except for the annual operation and maintenance costs incurred for 19 percent of the king salmon eggs up to 15,800,000 annually taken at Iron Gate and for all of the king salmon eggs in excess of 15,800,000 annually taken at Iron Gate.*"

As to the fish hatchery facilities: The court affirmed the Commission's decision that Licensee construct the fish hatchery at its sole expense. The court also affirmed the Commission's decision that Licensee should reimburse the Department for only 80 percent of operation and maintenance costs of the hatchery, because, the court agreed, the evidence "suggests" that Iron Gate would increase the fish population. However, the court added this important gloss: Article 50 of the Commission's order (29 F.P.C. at 486 (app. B at 38A)) would seem to require Licensee to reimburse the Department for 80 percent of operation and mainte-

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opinion restating the reasons for imposing 20 percent of the operation and maintenance costs for all fishery facilities on the Department. Commissioner O'Connor concurred in the result only, but without opinion or explanation. Commissioners Morgan and Ross, each dissenting in part and each filing a separate statement, disagreed with the Commission's decision to impose a part of operation and maintenance costs upon the State without its consent. The dissenting Commissioners made clear that they had joined in the original opinion assigning 20 percent of the operation and maintenance costs to the State solely upon their belief, proven to be mistaken upon petition for rehearing, that the State had agreed to bear 19 percent of those costs, which figure was simply rounded to 20 percent. As we have just noted (*supra* note 7), the 19 percent figure relates to a portion of the king salmon species only.

[9]These insertions do not change the legal effect, but make express what was already clearly implied.

nance costs regardless of whether the hatchery is operated at full or partial capacity. Thus, if the Department rejects the benefit of full capacity operation (which the Commission does not claim it can require of the Department) and operates at 80 percent capacity, Pacific would apparently be required to pay only 80 percent of 80 percent. The court concluded that the Commission intended that so long as the Department operates the hatchery at 80 percent capacity at least, Licensee should pay all operation and maintenance costs for such 80 percent capacity operation, but not to exceed actual costs. See app. A *infra* at 19A.

As to the fish trapping and egg collecting facilities: The court reversed the Commission and held that on the record the Department should bear all of those operation and maintenance costs for fish trapping and egg collecting facilities. The court held that the Department by the 1959 agreement with Licensee had impliedly agreed to pay for such operation and maintenance and that the Commission had shown no reason to disregard this contract. However, the court concluded that there may be evidence in the record or other evidence may be produced that would justify the Commission's decision as to operation and maintenance costs for those trapping and collecting facilities.

Accordingly, the court remanded to the Commission for further proceedings relating to the operation and maintenance costs of the fish trapping and egg collecting facilities and for clarification of Article 50 as desired.

Reasons for Granting the Writ.

This petition for certiorari raises an important public issue in the administration of the Federal Power

Act that has not been settled by the United States Supreme Court: To what extent must the Commission require a licensee to bear operation and maintenance costs for recreational facilities (such as fishery facilities) that the Commission has required the licensee to include in its project?

The proper resolution of this issue by the United States Supreme Court is required now, for these four reasons: First, it concerns the application of section 10(a), a key substantive provision of the Federal Power Act. Second, it involves the application of that section in the context of a significant recreational resource, namely, anadromous fish. Third, the issue may often arise again in the future regarding projects that may be licensed by the Commission on the many streams in California and in other western states in which anadromous fish thrive. Fourth, the resolution of this issue today with reference to this recreational resource (anadromous fish) may well control the resolution of the same issue tomorrow with reference to any other recreational resource. As such, the issue is of potential concern to every state in the Union.

As to the Fish Hatchery Facilities.

There is no dispute as to the meaning of section 10(a): That section requires any project licensed by the Commission to be best adapted to a comprehensive plan for improving or developing the waterway, *including beneficial public uses such as recreation.* That section also provides that the Commission can require modification of the project to secure such comprehensive plan. Section 10(a) thus empowers the Commission to require the construction, operation, and maintenance of fishery facilities by its licensee. App. A at 8A.

In this case, the Commission has approved, as meeting the standards set by section 10(a), the hatchery facilities of the size and capacity agreed upon by the parties. However, the Commission's order, as the Court of Appeals construes it, required Licensee to bear operation and maintenance costs for only 80 percent of the capacity of those facilities although, as the Court of Appeals observes, the Department may "choose to reject the benefit of full capacity operation (a benefit that the Commission does not claim that it can order the Department to accept) and [operate] at 80 percent" of full capacity (app. A at 19A).

Thus, the Court of Appeals permits the Commission, contrary to the command of section 10(a), to provide something less than a project "best adapted to a comprehensive plan." (The Commission does not contend that imposition upon Licensee of all such costs would render the project financially infeasible.) Operation and maintenance of any part of the capacity of the hatchery facilities, at the decision of the State (or any third party) fails, pro tanto, to complete the comprehensive plan that the Commission itself required.[10] Absent some undertaking on the part of the State (or by some other third party), the Commission can insure comprehensive development under section 10(a) only by imposing all costs for such facilities upon its licensee—the person that must obey the Com-

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[10]So far as the Commission's performance of its statutory function under §10(a) is concerned, it is immaterial whether the Department intervened as a party or initiated these proceedings for fishery facilities at Iron Gate. That is the position asserted by the Commission before the Court of Appeals. (Commission's Brief, pp. 17, 21.)

mission's order to get its license.[11] Otherwise, the decision we challenge here produces this irrational result: Licensee is required to pay for all construction costs for fish hatchery facilities of a specified size, 20 percent of which may never be put to use (at least so far as the Commission's order now provides).

Manifestly, this issue is of paramount importance in the administration of the Federal Power Act in all those western states in which anadromous fish thrive. The Klamath River, involved here, has been called "America's finest steelhead and salmon fishing stream." [1 Jt.App. 106-07.] In California, anadromous fish thrive in numerous streams on which the Commission has in the past and may in the future probably license power dams.[12] This is also true in other western states, particularly Oregon and Washington (both within the geographical boundaries of the Court of Appeals for the

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[11]Licensee has sought and been granted the valuable privilege of using public resources for its private gain. Protection, development, and improvement of those public resources are part of the price that Licensee must pay for that privilege. For that reason, the Commission can require its licensees to provide fishery facilities. That also is the position asserted by the Commission before the Court of Appeals. (Commission's Brief, p. 11.)

[12]This potential impact of the decision below, although obviously substantial, cannot be measured precisely, because of the lack of complete data concerning anadromous fish population and the obvious impossibility of predicting which potential power sites will be developed (or when) by power companies.

However, as to salmon only, official records of the Department of Fish and Game of the State of California show the following ranges or estimates of adult spawners that, by a conservative count, migrate annually in the following major salmon producing streams within California: 11,000 in Clear Creek (a tributary of the Sacramento River); 1,000 to 5,000 in the Cosumnes River; 70,000 in the Eel River; 11,000 to 86,000 in the Feather River; 175,000 in the Klamath River; 4,000 in the Merced River; 10,000 in the Russian River; 35,000 in the Stanislaus River; 50,000 in the Trinity River; 130,000 in the Tuolumne River; and 1,000 to 37,000 in the Yuba River.

Ninth Circuit). It has always been a major concern to these states and their people that the Commission require adequate provisions for anadromous fish in any license for a power project on a stream in which anadromous fish spawn.[13]

It is important that the extent of the Commission's obligation to provide for operation and maintenance of fishery facilities by its licensee be determined now. Otherwise, the Commission may well in future cases, as here, where it supposes that a project will improve fishery resources, fail to assure comprehensive development with regard to fishery resources and unjustifiedly leave a part of such development to be provided by a third person, if at all.

Finally, the error should be corrected now before it can permeate the Commission's decisions regarding conservation or improvement of other natural resources by its licensees.

The only other federal court decision that we have found that touches this issue is *FPC v. Oregon*, 349 U. S. 435 (1955), where the Court observed (349 U. S. at 451-52):

> "The applicant has agreed to provide facilities for conserving the runs of anadromous fish in

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The Department estimates that for each adult salmon reaching the spawning grounds, three salmon have been caught by commercial or sports fishermen. Each female salmon (and about 50% of the adult spawners are usually females) will lay from 3,500 to 7,500 eggs.

A listing of numerous undeveloped power sites on the foregoing rivers appears in an open file report: United States Department of the Interior, Geological Survey, *Gross Theoretical Water Power, Developed and Undeveloped, State of California* 18-28 (1964).

[13]See, *e.g.*, FPC v. Oregon, 349 U.S. 435 (1955); State of Washington Dept. of Game v. FPC, 207 F.2d 391 (9th Cir. 1953), *cert. denied*, 347 U.S. 936 (1954).

> accordance with plans approved by the Federal Power Commission. The capital cost of these facilities and of the reregulating dam, to be borne by the applicant, is estimated at $4,430,000. The total annual cost due to these facilities is estimated at $795,000. The Commission has found each of these estimates to be reasonable. Of the $795,000 annual cost, applicant will bear $410,000 (cost of borrowed money, depreciation and taxes on the capital investment), and the $10,000 maintenance cost of the reregulating dam. In addition, it has offered to contribute $100,000 annually toward the estimated $375,000 cost of operation and maintenance of the fish conservation facilities, and the Commission has retained the power to fix the amount of the applicant's contribution if a sum is not agreed upon."

This Court simply observed what the Commission said it would do, without comment as to the legality of whatever specific action might be taken. The question of whether the licensee may bear something less than 100 percent of operation and maintenance costs for all fishery facilities required by the Commission was not raised or ripe for decision at the time of that opinion.[14]

But even if *FPC v. Oregon* were read as permitting the Commission's licensee, in an appropriate case, to

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[14]We have been advised by an Assistant Attorney General for the State of Oregon, representing the Oregon State Game Commission, that pursuant to Article 27 of the license as amended in 1960 (Portland General Electric Co., 24 F.P.C. 408, 416) the Company is paying 100 percent of the costs of construction, operation, and maintenance of fishery facilities at the Pelton Project.

bear only part of such costs, there is no basis in the present record for such a determination. The Court of Appeals erroneously sustains the Commission that the record "suggests" that construction and operation of Iron Gate Dam will increase the fish population over natural conditions by eliminating natural fluctuations and changes in river levels.[15] App. A at 18A-19A. It is on this basis that the court sustains the Commission's decision that Licensee reimburse the Department for only 80 percent of operation and maintenance costs for fish hatchery facilities at Iron Gate.

There is no evidence in the record whatsoever that "suggests," let alone proves, that construction and operation of Iron Gate Dam will have any effect, beneficial or detrimental, upon the fish population compared with natural conditions. (A regulated flow might, in fact, be detrimental to fish population, *e.g.,* by failing to wash the spawning gravels as efficiently as natural flows or by resulting in a less oxidized supply more susceptible to pollution.) Hence, this reason for a partial reimbursement must fall under any interpretation of the statute.

Furthermore, the question whether Iron Gate's regulation will increase the fish population over natural conditions really misses the point. This case concerns the operation and maintenance costs for certain fishery facilities at Iron Gate. Even if Iron Gate's regulation

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[15]Only two record references were cited by the Commission to the Court of Appeals to support its contention (Commission's Brief, p. 29): One is simply a statement by the Commission staff counsel that such enhancement would occur (1 Jt.App. 224-25), and the other is the assertion in the Commission's opinion on rehearing that such enhancement would occur (2 Jt.App. 440). Neither is evidence.

should increase the fish population, nothing in the record shows that those fishery facilities are designed to do any more than to compensate for the injury to the fishery resource caused by Iron Gate dam's blockage of spawning grounds. There is nothing in the record that would show that those facilities have any capacity to handle an increase in fish population or to provide in any other manner for enhancement of the fishery resource.

As to the Fish Trapping and Egg Collecting Facilities.

There is another major error in the decision below. The Court of Appeals erroneously held that the Department in the 1959 agreement with Licensee [2 Jt.App. 260-69] impliedly agreed to bear all operation and maintenance costs for the fish trapping and egg collecting facilities constructed at Iron Gate. App. A at 14A-17A. As the Court of Appeals recognizes, the Commission ruled to the contrary—that the question of such costs was open for decision in the pending proceedings and was not foreclosed by the 1959 agreement. The agreement was received and relied upon by the Commission in its decision authorizing Iron Gate Development. 23 F.P.C. 59 (1960), reproduced at 2 Jt. App. 331. Furthermore, the Court of Appeals' construction is flatly contradicted by the subsequent conduct of both parties. See pp. 8-9 *supra*.

If this Court should hold that the question of operation and maintenance costs for the fish trapping and egg collecting facilities is not foreclosed by the 1959 agreement (as the Commission ruled and as we contend), then there is presented to the Court with respect to the fish trapping and egg collecting facilities the precise question discussed above with regard to the

fish hatchery facilities: May the Commission require Licensee to reimburse the Department for operation and maintenance costs for only 80 percent of the capacity of the fish trapping and egg collecting facilities? For the same reasons given above, we contend that this Court should review that question and hold that the Commission must require Licensee to reimburse the Department for such costs for 100 percent of the capacity of those fish trapping and egg collecting facilities as well as of the fish hatchery facilities.[16]

Conclusion.

This petition for a writ of certiorari should be granted because the Court of Appeals for the Ninth Circuit has decided—and decided wrongly—an important issue concerning the application of section 10(a) of the Federal Power Act with reference to important recreational resources of the nation. This issue has not been, but should be, settled now by the Supreme Court.

Dated: October 30, 1964.

Respectfully submitted,

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[16]See note 2 *supra*.

APPENDIX A.

Decree.

United States Court of Appeals, for the Ninth Circuit.

Pacific Power & Light Company, Petitioner, vs. Federal Power Commission, Respondent. No. 18853.

Department of Fish & Game of the State of California, Petitioner, vs. Federal Power Commission, Respondent. No. 18954.

Before: Pope, Merrill & Duniway, Circuit Judges

These causes came to be heard upon petition of Pacific Power & Light Company filed August 22, 1963 and the petition of the Department of Fish & Game of the State of California, filed October 16, 1963 to review an order of the Federal Power Commission issued by it on March 14, 1963 and as amended by a further order issued on August 19, 1963. The Court heard argument of respective counsel on March 9, 1964 and has considered the briefs and joint appendix filed in this cause.

On consideration whereof, and pursuant to the opinion rendered and filed, on June 8, 1964, It Is Ordered, Adjudged and Decreed by this Court that said causes be and hereby are remanded to the Federal Power Commission for further proceedings, not inconsistent with the opinion of this Court, relating to the cost of operating and maintaining the fish trapping and egg taking facilities, and for such clarification of Article 50 as it may desire to make. In all other respects, the orders of the said Federal Power Commission be, and hereby are affirmed.

A True Copy

Attest: August 21, 1964

Frank H. Schmid, Clerk.

Opinion of the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Pacific Power & Light Company, Department of Fish and Game of the State of California, Petitioners, vs. Federal Power Commission, Respondent. Nos. 18,-853 and 18,954 [333 F. 2d 689].

[June 8, 1964]

On Petitions to Review an Order of the Federal Power Commission

Before: Pope, Merrill and Duniway, Circuit Judges

Duniway, Circuit Judge:

These are petitions, consolidated for hearing and determination, to review a decision of the Federal Power Commission. The order in question relates to the Iron Gate Dam on the Klamath River in Northern California, a facility constructed by petitioner, Pacific Power & Light Company (Pacific) under a Commission license. Pacific attacks the portion of the order that requires it to construct, at its expense, a fish hatchery, and to reimburse the Department of Fish and Game of the State of California (Department) for 80 percent of the cost of operating the hatchery and of operating fish egg taking facilities already constructed. The Department also attacks the order, urging that Pacific should be required to pay 100 percent of the cost of the operation of these facilities, with one exception.[1]

[1]The Department voluntarily consents to bear operation and maintenance costs of Iron Gate Fishery facilities that may be incurred for all king salmon egg taking at Iron Gate over 15,800,000 annually, and 19% of the quantity up to that figure. It asserts that it has not agreed to bear any costs with respect

The Klamath River, which rises in Southern Oregon and flows into and across California to the Pacific Ocean, has long been a famous fishing stream, supporting large numbers of anadromous fish: king salmon, silver salmon and steelhead trout. Pacific's predecessor, the California Oregon Power Company (Copco), constructed five hydroelectric plants on the river and its tributaries, between 1908 and 1925. None was licensed by the Commission; three were constructed before the enactment of the Federal Water Power Act on June 10, 1920.

Two of the plants, Copco No. 1, built in 1918, and Copco No. 2, built in 1925, are located close together on the river and about 100 miles from the sea. Their construction cut off access to spawning areas above them, and Copco and the State of California therefore agreed that Copco should build a fish hatchery at Fall Creek, just below Copco No. 2, and an egg taking station. The hatchery was conveyed to the state, which operated it at its own expense, until 1948, when it was abandoned. Thereafter, eggs taken at the station were transported by the state to its Mt. Shasta hatchery.

Copco No. 1 and No. 2 have been operated as peak load facilities. Water was released downstream only when it was desired, because of demands on the Copco system, to add their power output. This has resulted in sudden and extreme fluctuations in the flow of the

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to species other than king salmon, or 81% of the king salmon eggs up to 15,800,000 annually.

The Department takes this distinction based upon its historical assumption of operation and maintenance costs of the now abandoned Fall Creek facilities and facilities substituted since its abandonment. However, this distinction becomes irrelevant in view of the conclusions we reach, *infra*.

river, which, in turn, has been detrimental to the fishery and hazardous to human life. While Copco claimed that its operation in this manner had continued so long that it had a prescriptive right to continue it, the state took a contrary position, and sought to prevent the operation as a public nuisance. In 1950 it filed suit for that purpose. (See *California Oregon Power Co. v. Superior Court,* 1955, 45 Cal.2d 858, 291 P.2d 455).

In 1951, Copco applied to the Commission for a license to construct another facility, called Big Bend No. 2. The Commission then issued an order requiring it to show cause why all of the existing facilities should not be brought under license. (See *California Oregon Power Co.,* 10 F.P.C. 1561) In 1954, the Commission held that all of the facilities were within its jurisdiction. (13 F.P.C. 1; 15 F.P.C. 14; *California Oregon Power Co. v. F.P.C.,* D.C. Cir., 1956, 239 F.2d 426) The 1954 order left open the question whether a license should require the installation of re-regulating facilities at Iron Gate.

In 1957, Copco asked for a license, Project No. 2082, for the existing facilities, and also for an amendment of the license to authorize the Iron Gate development, for two stated purposes, production of power and regulation of the flow of the river. Thereafter, in 1959, Copco and the state entered into an agreement which refers to the state's pending lawsuit and Copco's pending application for a license for Iron Gate. It recites that Iron Gate will regulate the flow of the river in the manner desired by the state, and that the desire of the parties is to facilitate the issuance of the license. Copco agrees to proceed with the development as soon as licensed, and to release water from it in a manner

specified. The agreement, paragraph 3, also provides: "Copco shall construct permanent fish trapping and egg collecting facilities at or near and downstream from the Iron Gate development, . . . and title thereto, . . . shall, upon completion of the facilities, be conveyed by Copco to the State;".

Copco received from the state a dismissal, with prejudice, of its lawsuit, and a release. It agreed, pending construction of Iron Gate, to "manually operate" Copco No. 1 and No. 2 so as to limit downstream fluctuations. The release is: ". . . from any and all claims, demands, actions and causes of action, for any and all legal and equitable relief arising at any time in the past, and for such reasonable future time as may be necessary for construction of the Iron Gate development referred to in said agreement by reason of alleged conduct of Copco of the kind described in the complaint in an action in the Superior Court of the State of California, in and for the County of Siskiyou, No. 13995." The agreement states, in reference to the release and dismissal: "The parties hereto understand and agree that the effect of said dismissal with prejudice and said release will be that no claim will ever be made against Copco in the future for damages or any other relief arising out of any act or omission of Copco, up to the date of this agreement so long hereafter as Copco shall perform its obligations under this agreement, of the kind embraced within the complaint in said state court suit; but that the prosecution of any action hereafter brought, claiming relief by reason of alleged wrongful conduct of Copco occurring after the date of this agreement, shall not be prejudiced thereby." It also provides: "The State, the Department and

the [California Fish and Game] Commission shall forthwith cause to be withdrawn and dismissed all protests and interventions with respect to the pending applications of Copco before the Federal Power Commission in Project No. 2082, and before the State Water Rights Board in Application No. 17,527; provided, that the right is reserved to all parties hereto to be heard in any future proceedings in regard to fishery facilities, other than the fish trapping, and egg collecting facilities referred to in paragraph 3 thereof." It does not state at whose expense the fish trapping and egg collecting facilities are to be operated. Pacific asserts that conveyance of title to the state means that the state is to operate them at its own expense, particularly because the reservation of the rights to be heard in future proceedings in regard to fishery facilities expressly excepts the fish trapping and egg collecting facilities.

Pursuant to the agreement, the state, the Department and the California Fish and Game Commission withdrew their protests and interventions in the Commission's Project No. 2082, and the Commission issued its license for Iron Gate in January, 1960. (23 F.P.C. 59; 25 F.P.C. 579). The order amends the license for Project No. 2082 to include the existing facilities, and to authorize Iron Gate, all as part of a single project. Article 30 contains the following reservations: "The Commission reserves the right to determine at a later date after notice and opportunity for hearing, the following matters . . . (b) Whether the Licensee for Project No. 2082 shall construct, operate and maintain a fish hatchery and appurtenant facilities."

Article 42 requires construction of the agreed-upon fish trapping and egg collecting facilities. It is silent

on the subject of their operation. Article 43, on the other hand, requires Copco to construct, maintain and operate fish ladders, fish traps, or other fish handling facilities or fish protective devices.

An amendment of March 27, 1961 adds Articles 49 and 50:

> "Article 49. The Licensee shall construct, maintain, and operate or shall arrange for the construction, maintenance, and operation of artificial propagation facilities and such other permanent fish facilities and protective devices including, but not limited to, fish-hauling trucks, fish screens or ladders, and comply with such reasonable modifications in project structures and operation in the interest of fish life as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing.
>
> "Article 50. The Licensee shall construct, concurrently with the construction of Iron Gate Dam, and thereafter operate and maintain permanent fish trapping, collecting, holding, and spawn-taking facilities and appurtenances at or near and downstream from Iron Gate Dam as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing."

Articles 42 and 43 were eliminated. The license, as so amended, was accepted by Copco.

In August, 1961, the Department petitioned, in Project No. 2082, pursuant to Article 49, for an order re-

quiring Pacific to construct, operate, and maintain a hatchery adjacent to the egg collecting station. The petition does not ask that Pacific be required to pay the cost of operating the egg collecting station. Pacific denied that a hatchery was necessary or appropriate, and the matter was heard on these pleadings. Pacific and the Department stipulated as to the size and type of hatchery that would be built, if the Commission should so order, but reserving Pacific's claims that a hatchery was not required and that, if required, Pacific should not pay for it or for its operation. The power of the Commission to require the construction and operation of fishery facilities, including a fish hatchery, rests on section 10(a) of the Federal Power Act, 16 U.S.C. §803(a), which provides that all licenses issued by the Commission shall contain conditions:

> "That *the project* * * * shall be such as in the judgment of the Commission will be best *adapted to a comprehensive plan for improving or developing a waterway or waterways* for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and *for other beneficial uses, including recreational purposes;* * * *" (Emphasis added)

The petitioners are agreed that the Commission is empowered by this subsection to require the construction and maintenance of a fish hatchery. The basic questions, then, are whether this is an appropriate case for the exercise of that power, and if so, whether the power has been properly exercised. Pacific also concedes that the question of whether a hatchery should be built was reserved, both in its agreement with the state and in the Commission's prior orders, and was properly

before the Commission upon the Department's August, 1961 petition. Its contention is that the evidence does not sustain the determination that a hatchery was needed. We do not agree.

The evidence shows that one of the reasons for constructing the Iron Gate Dam was to regulate the flow of the stream, so as to eliminate the extreme fluctuations caused by the method of operating Copco Nos. 1 and 2. It was Copco that chose to operate them that way. It could have abated the fluctuations by operating them in a different manner. It preferred the Iron Gate Dam because this would assure the continued operation of Copco Nos. 1 and 2 as peak load facilities, would create another source of power at Iron Gate Dam itself, and would eliminate the fluctuations as the state was seeking to require, both in its lawsuit and before the Commission. The fact that the state, which had been seeking to abate what it claimed to be the nuisance created by Pacific's method of operating its two facilities, decided to accept this method of abatement, does not make the choice that of the state rather than that of Pacific. At most it makes it the choice of both. When parties settle a controversy, the settlement is ordinarily not forced by one upon the other—usually it is a result somewhere between the desires of either.

The way in which these objectives were accomplished was by the building of a dam at Iron Gate, some 8 miles below Copco No. 2. This created a reservoir area some 8 miles long, into which flows the irregular discharges from the two Copco facilities, and in which they are held. The power plant and dam at Iron Gate are then so operated as to maintain a reasonably con-

tinuous discharge of water below Iron Gate. This does eliminate the fluctuations below Iron Gate, and does improve the fishery below Iron Gate.

There is, however, another result. The new reservoir, above Iron Gate, submerges some 16 miles (about 8 on the Klamath; about 8 on its tributaries) of the better fishing and spawning grounds on the river. It covers them with comparatively still water, and renders them unfit for spawning, and less desirable as habitat. The evidence supports, though it may not require, a finding that most fish headed upstream and reaching the barrier of Iron Gate Dam will not turn back downstream to spawn, and that a substantial percentage (perhaps over 50%) of the fish moving upstream will be so affected. The fish could not testify. The commission had to rely upon studies by, and the opinion testimony of, expert biologists. In the nature of things, precision in prediction was quite impossible. But as we read the record, we think that it fairly supports the Commission's conclusions that "without a hatchery there can be no assurance that the fishery resource will be preserved and maintained at a level approximately equal to that which existed prior to construction of the Iron Gate Development" and that "[s]ince Licensee has created the situation which necessitates the fish hatchery, it is no more than reasonable to require that it pay the cost of construction thereof."

We have no doubt that the Commission could require Pacific to construct the hatchery at its own expense. Pacific's operations, as a unit, substantially interfere with the natural ecology of the river and deleteriously affect one of its most valuable recreational features. It is quite proper that, as a condition to its

having the privilege of so doing, Pacific should be required to pay for facilities that will, at least in part, prevent the impairment of the principal recreational feature of the stream.

The Commission's orders do not directly require that the hatchery be conveyed to the state, as the contract between Pacific (Copco) and the state requires that the egg taking facilities be conveyed. But this result is certainly implicit in the order, else why the requirement that Pacific reimburse the Department for 80 percent of the cost of its operation and maintenance? At oral argument, counsel for Pacific stated that it would prefer to own and operate the hatchery itself. This, however, seems to be an afterthought. We cannot find in the record any indication that it seriously urged this contention before the Commission. There, its position has been (a) that no hatchery is needed, (b) that if one is needed, Pacific should not be required either to build it or pay for it, and (c) that in any event it should not be required to pay for maintenance and operation. It does not now urge that the state is not able or willing to operate the hatchery properly.

Assuming that the contention is available to Pacific, we cannot say that it is improper for the Commission to require conveyance of the hatchery to the state. The state and federal governments are not such separate entities, either legally or in fact, that one cannot call upon the other to help to achieve, in the public interest, a result that they both desire. The objective that the Commission seeks here is one that Congress has authorized it to seek. The choice of means, so long as they are reasonably adapted to achieve the authorized end, is not for Pacific, but for the Commission. There is

no doubt, upon this record, as to the competence of the state to operate the hatchery, or its willingness to do so. If there be evidence in the record that Pacific is equally able and willing, it has not been called to our attention.

There remain the questions of the expense of maintenance and operation (1) of the hatchery and (2) of the egg taking facilities. As to the hatchery, we think that what we have already said disposes of the question. If the Commission could have required Pacific to build and itself to maintain and operate, and if, as we have held, it could require conveyance of the hatchery to the state, it can also require that the state be reimbursed for the expense of maintenance and operation. Unless the hatchery is maintained and operated, its construction means nothing, and the desired end, preservation of the fishery, will not be achieved.

Pacific's reply is, first that the Commission is meddling in matters that are beyond the scope of the Federal Power Act, and is acting in contravention of state laws. It says that, if no funds were provided by it, the Department would still be required by state law to operate the hatchery at its expense, and that therefore the Commission's order improperly interferes with the fiscal affairs of the state, and unlawfully imposes upon Pacific a burden that, under state law, Pacific is entitled to have the state bear. It says, second, that its settlement agreement with the state gives it a contract right to have the state maintain and operate the hatchery.

In support of its first argument, Pacific cites Section 5938 of the California Fish and Game Code. That section provides:

"Whenever in the opinion of the [California Fish and Game] commission it is impracticable, because of the height of any dam, or other conditions, to construct a fishway over or around the dam, *the [California Fish and Game] commission may,* in lieu of the fishway, *order the owner of the dam completely to equip,* within a specified time, on a site to be selected by the department, *a hatchery,* together with dwellings for help, traps for the taking of fish, and all other equipment necessary to operate a hatchery station, according to plans and specifications furnished by the department. *After such hatchery has been constructed,* the department shall operate *it* without further expense to the owner of the dam except as provided in sections 5940 and 5941." (Emphasis and bracketed words added.)

It was first enacted in 1917 (Cal. Stats. 1917, ch. 749, §1), before the Federal Water Power Act, and on its face deals only with hatcheries ordered constructed by the state. It does not purport to deal with federally licensed projects. Here, it is the Commission, not the state, that ordered the hatchery constructed. The Department's request that the Commission do so does not make the order the state's order. Indeed, we think it doubtful that the state could have ordered this federal licensee to construct a hatchery at this federally licensed facility. We think there is nothing in Pacific's first contention. Nor is there anything in Pacific's argument that the Department has no authority to receive or use the funds required to be paid to it. We doubt if Pacific has any standing to raise the question. Section 13,011 of the California Fish and Game Code does not support Pacific's arguments.

The short answer to Pacific's second contention is that there is nothing in the agreement with the Department, or the release, that requires that the Department, rather than Pacific, pay for the operation or maintenance of the hatchery. On the other hand, Article 49 of Pacific's license does require Pacific to "construct, maintain and operate, or . . . arrange for the construction, maintenance and operation of artificial propagation facilities . . . as may be prescribed hereafter by the Commission. . . ."

The egg taking facilities present a different question. They were provided for in Pacific's agreement with the Department, had been constructed and conveyed to the Department, and were being operated by the Department, when the order under review was made. We assume that Article 50 reserves the question as to who shall pay for operation and maintenance, as the Department claims.[2] But we are of the opinion that the contract, although it does not specifically refer to maintenance and operation, contemplates maintenance and operation by the Department, and that the reservation in the contract relating to fishery facilities, which specifically excepts these facilities from its terms, does not reserve to the Department the right to demand that maintenance and operation be paid for by Pacific. The Department made a post hoc attempt to

[2]We are not, however, convinced that it does. Article 50 refers to facilities of this kind that "may be prescribed hereafter . . . after notice and hearing." Hereafter must mean after March 27, 1961, when Article 50 was added to the license. The Commission had previously, in Article 42, of January 13, 1960, ordered Pacific to construct the agreed facilities. They were completed and tendered to the state by February of 1962. How, then, can Article 50 refer to them? On its face, it appears to refer to possible different or additional facilities.

keep the question open by accepting the conveyance of the facilities as agreed, but seeking to reserve the question unilaterally. This, however, cannot change the effect of the agreement, although the Commission seems to rely rather heavily upon it. We do not think that Article 50 is a valid contrary determination by the Commission. Nor does the original reservation in Article 30 of the license for Iron Gate reserve this question. The Department's petition did not ask for this relief specifically.

It may well be that none of these facts, as a matter of law, prevents the Commission from requiring Pacific to pay for the maintenance and operation of these facilities.[3] But the existence of power in the Commission does not dispose of the problem. The state arrived at a settlement with Pacific, under which these facilities were constructed and conveyed by Pacific to it. The Commission, to that extent, saw to it that the state got this benefit of its bargain. The state reserved no right to make further demands in this connection. We hold that it impliedly agreed to pay for maintenance and operation. This, together with the Commission's orders relating to the hatchery, appears to us, absent other facts, to assure the desired preservation of the fishery. The Commission gives us no reason in public policy why the Commission should now transfer the burden to Pacific and relieve the state from its bargain. We think that it would be justified in so doing only if it found upon sufficient evidence that

[3]The Commission says that it is not bound by any agreement between Pacific and the Department, citing *F.P.C. v. Oregon*, 349 U.S. 435; *First Iowa Hydro-Electric Coop. v. F.P.C.*, 328 U.S. 152, and other cases. This, however, does not mean that the Commission can arbitrarily disregard the contract.

there are sound reasons to do so. It made no such finding or determination. So far as its findings and opinion reveal, it based its decision entirely upon what we hold to be its erroneous legal conclusions, either (a) that the state had not agreed to pay the cost of operation and maintenance, or (b) that the state could unilaterally relieve itself of its obligations, or (c) that Article 50 had the effect of relieving the state of its obligations.

The Commission now asserts in its brief that it is not bound by the contract, assuming that it means what Pacific says that it does and what we hold that it does. We quite agree that this is not a private lawsuit between Pacific and the Department. We also agree that the Commission is not "bound" by the contract. We do not, however, think that this alone is a reason for disregarding the contract.[4] As the Supreme Court has said in *Burlington Truck Lines, Inc. v. United States*, 1962, 371 U.S. 156, 167:

> "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. See *Siegel Co. v. Federal Trade Comm'n*, 327 U.S. 608, 613-614. Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements

[4]The Federal Power Act, §313(b) (16 U.S.C. §251/(b)) declares that this court, on review of an order of the Commission, has jurisdiction "to affirm, modify or set aside such order [of the Commission] in whole or in part." The Administrative Procedure Act §10(e) (5 U.S.C. §1009(e)) directs that this court shall "hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

> for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster, which rules with no practical limits on its discretion.' *New York v. United States*, 342 U.S. 882, 884 (dissenting opinion). 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.' *Federal Communications Comm'n v. RCA Communications, Inc.*, 346 U.S. 86, 90."

The Commission does not act in a vacuum, and we think it just as much bound to take into account a contract of this kind, which, if carried out, would assist in accomplishing the result that the Commission desires, as it is to take into account the topography of the Klamath River Basin and the biological functioning of anadromous fish. Surely, it would be arbitrary if the Commission had concluded, in the face of the evidence, that the fish would spawn successfully in the reservoir formed by the Iron Gate Dam, when all of the evidence is that they would not. So here we think it arbitrary for the Commission to disregard the contract for no apparent reason. It has not found, and it makes no attempt to point to any evidence that would support a finding of reasons to disregard the contract and thus relieve the state of its bargain.

There remains the Department's contention that the Commission could not require that it pay 20 percent of the cost of maintenance and operation of the hatchery. The Commission did not so order. It merely ordered that Pacific pay 80 percent. The Department asserts that section 10(a) of the Act, quoted *supra*, requires that the Commission impose the entire cost upon Pacific. The section certainly does not do so ex-

pressly. It merely requires conditions in the license that, "in the judgment of the Commission," will be best adapted, *inter alia*, "for other beneficial uses, including recreational purposes." We think that this gives the Commission wide latitude, and that its judgment should not be disturbed unless exercised in an arbitrary manner.

Here the Commission determined that "[t]he evidence in the record *suggests* that the regulation of the flow of the Klamath River by the Iron Gate Dam combined with the construction and operation of the hatchery will result in a greater fish population than if Iron Gate had not been built. This would stem from the reduction or elimination of destruction of natural fluctuation and river levels which will follow from the construction of Iron Gate Dam and its operation in accordance with the year-round minimum releases required by Article 52 of the license. To impose on the Licensee the full costs of building and operating the hatchery would not merely restore the status quo, but would actually require Licensee to pay for enhancing the fish production as compared with pre-Iron Gate conditions. Apportioning 20 percent of the operating costs to the Department will *more nearly* result in restoring the status quo." (Our emphasis)

The Department attacks this statement as inconsistent with the formal finding that the hatchery is needed to compensate for the loss of spawning grounds above Iron Gate, and is necessary to sustain the fishery at a level *"approximately equal"* to that which existed before the construction of Iron Gate. In this, the Department is perhaps technically correct. We do not think, however, that the matter should be treated with such iron rigidity. As we have pointed out, the Com-

mission was here dealing with predictions. The evidence does indeed "suggest" what the Commission says it does. Even the finding on which the Department relies deals only with conditions "approximately equal" to pre-Iron Gate conditions. We do not think that the Commission's conclusion is unreasonable. We need not consider the other bases for its order that are stated in the Commission's opinion. We neither approve nor disapprove them.

We do think, however, that Article 50 of the license is unclear in one respect. Rather than requiring Pacific to pay the full cost of operating and maintaining the hatchery at 80 percent of capacity, it requires that it pay 80 percent of the annual cost of operation and maintenance. Thus, if the Department chose to reject the benefit of full capacity operation (a benefit that the Commission does not claim that it can order the Department to accept) and operates at 80 percent, Pacific would pay only 80 percent of 80 percent. This appears to be inconsistent with the views expressed by the Commission itself. We presume that the Commission intends that, so long as the Department operates the hatchery at at least 80 percent of capacity, Pacific should pay for the cost of operating at 80 percent of capacity, but that in no event should Pacific be required to pay more than actual operating costs.

It may be that there is evidence now in the record, or that other evidence can be produced, that would justify the decision of the Commission as to the operation and maintenance of the fish trapping and egg taking facilities. That is a question for the Commission, not for us. (*Burlington Truck Lines v. United States, supra; F.P.C. v. Idaho Power Co.*, 1952, 344 U.S. 17, 20-1)

The matter is remanded to the Commission for further proceedings, not inconsistent with this opinion, relating to the cost of operating and maintaining the fish trapping and egg taking facilities, and for such clarification of Article 50 as it may desire to make. In all other respects, the orders of the Commission are affirmed.

APPENDIX B.

[29 F.P.C. 478.]

OPINION NO. 381

PACIFIC POWER & LIGHT COMPANY, PROJECT NO 2082

Opinion and Order on Petition to Require Licensee to Construct, Operate, and Maintain a Fish Hatchery, Amending License, and Directing Revised Filings (Issued March 14, 1963)*

* * * * *

Commission *Requires* Licensee to Construct Fish Hatchery at Its Iron Gate Dam to Compensate for Spawning Areas Rendered Inaccessible by Dam's Construction. P. 482.

Before Commissioners: Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, jr., Charles R. Ross, and Harold C. Woodward.

Woodward, *Commissioner:*

This proceeding arose before the Commission on a petition filed August 21, 1961, by the State of California, acting by and through its Department of Fish and Game (Department), requesting that the Commission require Pacific Power & Light Company (Licensee), licensee for Project No. 2082,[1] to erect and maintain a fish hatchery and appurtenant facilities, pursuant

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*Initial decision appears on p. 487. Opinion 381-A, issued August 19, 1963, 30 FPC [499].

[1]By orders issued June 16, 1961, 25 FPC 1154, 1156, the Commission approved a merger between Licensee and The California Oregon Power Company (COPCO), Licensee being the surviving corporation. Pacific Power & Light Company is subject to all conditions of the licenses previously issued to COPCO, which includes Project No. 2082. The license for the project expires February 28, 2006.

to Article 49 of the license, to continue the normal runs of salmon and steelhead trout which have been displaced by Licensee's construction of its Iron Gate Development on the Klamath River in northern California. Licensee answered the petition on September 13, 1961, by denying the need for a hatchery or other fishery facilities for the purpose stated, or that it should be required to construct or maintain such facilities. Pursuant to order of the Commission, a hearing was held in San Francisco, California during June 1962. The parties' arguments were consistent with their pleadings, the Department presenting testimony of fish biologists regarding the present and anticipated deleterious effects of the Iron Gate Development to support its contention that the hatchery is vital to the preservation of the fishery resource, while Licensee claimed that the evidence as so presented and as contradicted by testimony of its own biologist fails to establish that the existing resource will not adequately be maintained without the hatchery. The staff of the Commission adopted a position supporting the need for the hatchery and its construction by Licensee but proposed that the Department and Licensee share equally in the costs of operation and maintenance.

On November 14, 1962, the presiding examiner issued his initial, or recommended, decision *(infra)* in which he determined that Licensee should be required to construct a fish hatchery facility at its expense to replace the natural spawning grounds eliminated by Iron Gate Dam, but that the cost of operation and maintenance of the hatchery and of the other appurtenant facilities thereafter should be borne by the State of California. Exceptions to the decision have been

filed by each of the three parties, *i.e.*, Licensee, the Department, and the Commission's staff,[2] and oral argument was held before the Commission on January 24, 1963, at the Department's request Pursuant to leave granted at the conclusion of the oral argument, Licensee and the Department have submitted comments on statements of fact made by opposing counsel, which memoranda have been considered by the Commission.

In order to place the proceeding in its proper context, a brief recitation of the underlying factual background is desirable. As noted in the examiner's decision, the present controversy is the latest episode in a protracted dispute between the Department and Licensee dating from 1918 and 1925 when the two hydroelectric plants known as Copco No. 1 and Copco No. 2 were constructed on the Klamath River in California a few miles below the Oregon border.[3] These dams were too high to permit fish migrations and Licensee therefore constructed a hatchery a short distance below the dams on Fall Creek, a tributary of the Klamath River, conveying the facility to the State in 1919. In 1925 fish trapping facilities and an egg collecting station were constructed and similarly conveyed to the State. The Fall Creek hatchery was operated and maintained until 1948 when it was discontinued as uneconomical. Use of the trapping and egg collecting facilities was continued until the construction of the Iron Gate Development, which includes new facilities for these purposes.

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[2]Representatives of the Department of the Interior and the California Senate Fact Finding Committee on Natural Resources were present at the hearing but did not enter formal appearances nor did they participate therein.

[3]The Klamath River in California and Oregon was held to be a navigable water in the United States in *The California Oregon Power Company*, 13 FPC 1, 12.

Operation of the existing hydroelectric plants as peak-loaded facilities with alternate storage and release of large volumes of water produced severe changes in the downstream river level and eventually led to the filing of a suit by the State of California in 1950 to enjoin the abnormal fluctuations as a continuing public nuisance. Following a course of extended but inconclusive litigation, Licensee filed an application in January 1957 for amendment of the license to authorize construction of the Iron Gate Development, approximately eight miles below Copco No 2, the primary purpose being to even out the flows below the Copco plants. On July 27, 1958, Licensee and the Department entered into an agreement under which the Department withdrew its informal objections to the proposed Iron Gate Development and acknowledged that the construction thereof would serve to reregulate the flow of the Klamath River in a manner satisfactory to the State. Licensee agreed that it would construct the permanent fish trapping and egg collecting facilities which are now a part of the development. The necessity for the construction of a fish hatchery at Iron Gate expressly was preserved for future determination. Article 6(b) of the agreement providing "* * * that the right is reserved to all parties hereto to be heard in any future proceedings in regard to fishery facilities, other than the fish trapping and egg-collecting facilities. . . ." The agreement was made a part of the record in the 1959 proceeding and was relied on by the examiner in denying a finding proposed by the Department implying a determination that the hatchery was to be constructed as a condition of the license.[4] No exceptions were filed to the exam-

[4] 23 FPC 61, 68.

iner's approval of the application for construction of the Iron Gate Development, and on January 13, 1960, the decision was adopted by order of the Commission.[5]

On March 27, 1961, the Commission, pursuant to application of Licensee, issued an order further amending the license to authorize certain requested changes in design and in the timing of construction.[6] Articles 49 and 50, as presently constituted,[7] were included in the license at that time. These Articles provide as follows:

Article 49. The Licensee shall construct, maintain, and operate or shall arrange for the construction, maintenance, and operation of artificial propagation facilities and such other permanent fish facilities and protective devices including, but not limited to, fish hauling trucks, fish screens or ladders, and comply with such reasonable modifications in project structures and operation in the interest of fish life as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing.

Article 50. The Licensee shall construct, concurrently with the construction of Iron Gate Dam, and thereafter operate and maintain permanent fish trapping,

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[5]*The California Oregon Power Company*, 23 FPC 59.

[6]*Ibid.*, 25 FPC 579.

[7]Analogous provisions were contained as Articles 42 and 43 in the 1960 license amendment, accepted by the Licensee on January 26, 1960. Article 43, which was similar to present Article 49, was incorporated after consultation with the U.S. Fish and Wildlife Service and the Department, and in line with a modification suggested by Licensee in a letter to the Commission filed September 9, 1957. The March 1961 amendments were accepted by the Licensee on April 10, 1961.

collecting, holding, and spawn-taking facilities and appurtenances at or near and downstream from Iron Gate Dam as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing.

Construction of the Iron Gate Development, including the fish trapping and egg collecting station, was undertaken in February 1960 and completed in January 1962 at a claimed cost of approximately 8.4 million dollars. In conformity with the license, an 18,000-kilowatt generator connected to a 25,000-horsepower turbine has been installed and is in operation.

One of the issues under dispute in the hearing involved the size of the hatchery as proposed by the Department. At the examiner's request a meeting was held between Licensee and the Department after conclusion of the hearing at which the parties signed a stipulation agreeing to the specifications of the hatchery facilities which would be built if required by the Commission. The stipulation, filed August 17, 1962, is without prejudice to Licensee's position that there is no need for a hatchery and that, if a hatchery is found to be required, it is not liable for the costs associated with the construction, operation, or maintenance thereof. Construction of the fishery facilities as originally proposed by the Department in 1961 was estimated to cost $1,003,020. Although no computations have been made as to the cost of the stipulated facilities, the fact that the total weight of fish to be produced has been lowered in the stipulation from 121,500 pounds to 50,000 pounds per year indicates that the cost of construction will be substantially less than the million dol-

lar figure. The staff has estimated that annual operating and maintenance costs will be reduced from $95,256 which would have been needed to run the proposed facility to approximately $54,278 for those stipulated in the agreement.

Upon our consideration of the record and the oral arguments presented by counsel, we are of the opinion that the Licensee properly should be required to construct a hatchery of the capacity provided in the stipulation to compensate for the spawning areas which have been rendered inaccessible by the dam's construction. The costs of operation and maintenance of the fish facilities, however, should not, we believe, be assessed wholly against the Licensee. Instead, and assuming that the Department will be the operating agency, we shall direct Licensee to reimburse the Department for 80 percent of the annual expenses incurred in the operation and maintenance.

There is no question that the Commission has the power to require construction of the requested facilities by the Licensee. The question of jurisdiction over Project No. 2082 was considered in the original *California Oregon Power Company* case, 13 FPC 1,[8] and was determined to vest in the Commission generally under Part I of the Federal Power Act on the ground of navigability of the Klamath River. In addition, the Commission found that the project would utilize surplus water from the Link River Dam, a "Government dam" within the definition of Section 3(10) of the Act, and therefore was subject to our licensing authority

[8]Opinion No. 266, 13 FPC 1, rehearing denied March 29, 1954, supplemental Opinion No. 266—A, 15 FPC 14, affirmed 239 F. 2d 426 (CADC, 1956).

under Section 4(e). Inclusion of the Iron Gate Development with the previously constructed developments was affirmed by the Commission in its January 1960 order. It is clear that the Commission may require the construction, maintenance, and operation of fishways by a licensee. Section 10(a) of the Act requires the Commission, before issuing a license for hydroelectric development, to find that the project shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan of development of the water resources for power and all other beneficial public uses. This provision has been interpreted to embrace the conservation, preservation, and enhancement of anadromous fish resources, and the Commission, on a number of occasions, has directed the inclusion of fish facilities in licensed projects where appropriate.[9] Licensee has conceded that the Commission has the power and obligation in the present proceeding ". . . to take such measures as are reasonably necessary to preserve fish and wildlife."

The factual evidence presented by the Department is amply covered in the examiner's decision and need not be repeated herein. Although Licensee maintained that the Department has not established the need for a hatchery at Iron Gate, and questioned the accuracy of the Department's estimates as to the number of fish formerly spawning above the site of the Development, it

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[9]*City of Tacoma, Washington*, 10 FPC 424 (1951); *Portland General Electric Company*, 10 FPC 445 (1951); *Idaho Power Company*, 14 FPC 55 (1955); *City of Eugene, Oregon*, 14 FPC 408 (1955); *Puget Sound Power and Light Company*, 15 FPC 1496 (1956); *Portland General Electric Company*, 17 FPC 58 (1957); *Puget Sound Power and Light Company, et al.*, Projects Nos. 943 and 2114, Order Directing Modifications in Rock Island Dam Fishways, issued October 24, 1962, 28 FPC 718.

admitted that some spawning and rearing areas have been eliminated by the Dam's construction. Licensee argued, however, that normal runs will be sustained by the spawning grounds located below Iron Gate. The examiner concluded that while the Department's estimate that 57.1 percent of the fish runs at Klamathon Racks spawned above the Iron Gate site was open to question, the estimates were the best available and do support the necessity for additional fishery facilities at Iron Gate to replace the natural hatching and incubation process that would normally have occurred in the lost spawning areas. He also found no apparent evidence in the record to support Licensee's assertion that the fish would turn back on reaching the Dam and spawn downstream.

Licensee has continued in its exceptions to assert that there is no evidence to support the finding that (1) there are not sufficient spawning grounds elsewhere in the river to support the runs which might have spawned in the eliminated area, or (2) if there are such spawning grounds, they will not be used by the fish. Attacking the Department's estimates of the number of fish formerly spawning above Iron Gate as "completely speculative," it argues that without more definite evidence the need for a hatchery has not been established with adequate certainty. It also contends that the improvement of conditions for anadromous fish runs in the river and of the recreational potential[10] in the upper Klamath area resulting from the construction of Iron Gate Dam more than satisfy the obligations of Licensee and its ratepayers to the public, stating:

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[10]A reservoir of approximately 1,200 surface acres has been created which is available to the public.

> In contrast to the public benefit already conferred by the company and its ratepayers, the benefit which might be realized by the construction of further fishery facilities is insignificant. We have already shown that there is no substantial evidence in the record to support a need for a hatchery. If no need can be shown the prospect for benefit is obviously small. In the face of these circumstances, it is apparent that the point of diminishing return for investment of Licensee's dollars in fishery facilities in the upper Klamath has long since been reached. The Licensee cannot in good conscience be required to pay more.

In support of its position that further expenditures should not be required of it for the development of natural resources, Licensee has cited certain of the past decisions of the Commission. A reading of those cases will reveal, however, that the Commission thoroughly considered on each occasion the effect of the proposed development on the anadromous fish population and found either a negligible result or made suitable provision to insure the perpetuation of the fish resource. Thus, in the *Portland* case,[11] the Commission rejected a request for fish facilities more extensive than those proposed in the application on a finding that the Deschutes River above the Pelton project site ". . . is not now a relatively large producer of anadromous fish and the likelihood of its becoming so in the near future is relatively remote." The cost of fish facilities installed at the project may amount to over five million

[11] 10 FPC 445 at 450. The decision of the Court of Appeals vacating the Commission's order, 211 F. 2d 347, was in turn reversed in *F.P.C. v. Oregon*, 349 U.S. 435, 75 S. Ct. 832.

dollars out of a total cost of approximately $20,575,000. In *City of Tacoma*[12] the Commission directed the licensee to install various fish facilities at an estimated initial cost of $7,100,000. The ultimate cost of facilities and improvements for the fishery resources program was expected to approximate $9,465,000 with an annual cost of operation and maintenance estimated at $610,000. It may be noted that the licensee proposed to construct and operate extensive fish hatchery facilities as a complement to the other fish protection measures. In *City of Eugene,*[13] the provisions in a conservation agreement between the licensee and the State Game Commission were deemed adequate to provide protection for the fishery resource in view of evidence that anadromous and fresh water fish did not ascend the river to the project area. Finally, in the *Idaho* case,[14] a provision was included for the licensee's construction of fishery facilities in recognition that the proposed Oxbow, low Hells Canyon and Brownlee developments on the Snake River ". . . would adversely affect the fish and wildlife resources of the area, and particularly the anadromous fish." The decision shows that an expenditure of about five million dollars was anticipated for the fishery program, exclusive of a low barrier dam which might be needed.

The cases relied upon by Licensee not only fail to afford support for its claim, but serve to demonstrate the importance attributed by the Commission to the preservation of existing fish resources in the com-

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[12]10 FPC 424, 428-432, 436-439, affirmed 207 F. 2d 391, *cert.* denied 347 U.S. 936.

[13]14 FPC 408, 413, 418.

[14]14 FPC 55, 63, 77, affirmed 237 F. 2d 777, *cert.* denied 353 U.S. 924.

prehensive development of the nation's waterways. We agree with the examiner that without a hatchery there can be no assurance that the fishery resource will be preserved and maintained at a level approximately equal to that which existed prior to construction of the Iron Gate Development. As brought out in the record, Licensee could have applied for authorization to change its method of operation of the Copco plants, thereby obviating the necessity for the reregulating facility and leaving the spawning areas undiminished. For purely economic reasons it chose not to do so, and has created an impassable barrier which the evidence indicates will have a deleterious effect on the pre-existing fish population. Moreover, the evidence clearly establishes that construction and operation of the fish hatchery and related facilities, whether of the extent specified in the Department's petition or of the more limited capacity called for in the stipulation agreements, will not render the Iron Gate project economically infeasible.[15]

Licensee has excepted to a statement of the examiner tying the hatchery to the Article 50 facilities built under the terms of the July 1959 agreement and since conveyed to the State as elements necessary to a complete fishery facility. In view of the fact that these facilities were constructed solely to replace the trapping

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[15]Although suitable regulation of the river flow could have been achieved through operating Copco No. 1 and Copco No. 2 as steady flow plants rather than as peak-load facilities and the Commission could have directed Licensee so to modify its operations, this would have resulted in a loss of one-half of the 56,000 kw generating capacity of those plants. As noted earlier, Licensee has installed 18,000 kw capacity at the Iron Gate Development. At $210 per kw, the average cost given by Licensee for its hydroelectric facilities, the loss of 28,000 kw would have cost it $5,880,000.

and egg collecting station formerly situated at Fall Creek, the argument of Licensee that its assumption of the cost of their construction should not influence the determination regarding responsibility for the hatchery construction costs is well taken and is accepted.

Since Licensee has created the situation which necessitates the fish hatchery, it is no more than reasonable to require that it pay the cost of construction thereof. For this same reason, it must also be required to pay for a substantial portion of the costs involved in the operation and maintenance of the facility. Only in this manner will the taxpayers of the State of California be saved from the imposition of a burden in the form of annual operating and maintenance expenses arising from an election of Licensee in a situation where an alternative course of action could have been selected by it which would not have necessitated the hatchery facilities. Licensee's argument that it should not be required to pay the cost of operation and maintenance on the basis of Section 5938 of the California Fish and Game Code and of the State policy as expressed therein is unavailing, as is its contention that the question as to who shall pay these expenses ". . . is a matter between the State and the Company." Whether the State Legislature intended that the statutory provision would be applicable to federally licensed projects or, as alleged by the Department, the section refers only to hatcheries constructed pursuant to State requirement, is wholly immaterial since the Federal government, in its enactment of the Federal Power Act, has occupied the entire field of licensing power projects on navigable and interstate water, to the exclusion of

concomitant state jurisdiction.[16] That no residual or supplementary control with respect to the determination of necessary provisions for maintenance of the fish resource has been left to the states was indicated in the passage of the Fish and Wildlife Coordination Act,[17] which contemplates that power companies operating under a federal license would be required to make adequate provision for fish conservation as a condition of the license.

We are not convinced, however, that Licensee should be required to pay the full costs involved in operating and maintaining the hatchery and related facilities.[18] Some sharing in costs already is envisioned in Item No. 1(c) of the stipulation as agreed to by the parties. Reregulation in the flow of the Klamath River by Iron Gate Dam will not only restore the downstream reaches to the condition which existed prior to 1918 but will also serve to diminish or possibly even eliminate destructive natural fluctuations in the river level, particu-

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[16]*State of Washington Dept. of Game v. F.P.C.*, 207 F. 2d 391; *F.P.C. v. Oregon*, 349 U.S. 435.

[17]16 U.S.C. 661, *et seq.*

[18]Both the Department's brief and that of the Licensee include the question of responsibility for the costs of operation and maintenance of the fish trapping and egg collecting station among the issues to be decided herein. Licensee's statement that the Department undertook to operate these facilities and indictating that the matter is settled is contradicted in the exchange of correspondence between Licensee and the Department wherein the latter was permitted to operate the facilities temporarily in full recognition by both parties that such action was not determinative of the issue as to their continued operation and maintenance. The presentations made by the parties do not distinguish between the facilities on this point nor do they in any way indicate that the matter is now ripe for decision. Our determination herein with respect to operation and maintenance of the hatchery facility, accordingly, is also dispositive of this issue.

larly in those reaches contiguous to the Development. To this extent, the river and the enjoyment thereof by the people of the State of California will be enhanced over its original condition. Availability of the Iron Gate Reservoir to the public for lake fishing, boating, swimming, and other recreational activities likewise indicates that the advantages to be derived from Licensee's election to construct the Iron Gate Development are not all one-sided. In our opinion, an equitable division of costs will be achieved, commensurate with the benefits attained, if Licensee is required to construct the hatchery and, again assuming State operation, to pay the State for 80 percent of the yearly costs of operation and maintenance of all fishery facilities at the Development. Although we are unable to order the State of California to assume the remaining 20 percent of the operation and maintenance expenses, we believe that the apportionment of costs as herein set out is reasonable and will be so considered by the State agency. Apportionment of the costs in this manner also will provide the State with a financial incentive to assure economy of operation of the fishery facilities. Moreover, while no major difficulties are anticipated under the arrangement, we shall retain continuing jurisdiction to settle possible disputes which may arise over the determination of the proper annual amount to be charged Licensee by the State.

The Commission further finds:

(1) Iron Gate Development is a unit of Project No. 2082, licensed to Pacific Power & Light Company, and is situated on the Klamath River, a navigable water of the United States as previously found by the Commission.

(2) Iron Gate Development has been constructed by Pacific Power & Light Company and is now in operation.

(3) Iron Gate Development blocks and prevents the seasonal migration of anadromous fish to approximately 16 miles of spawning gravels in the Klamath River and its tributaries between the Iron Gate Development and the Copco No. 1 and Copco No. 2 hydroelectric plants.

(4) To compensate for the loss of the spawning areas described in Finding (3) hereof, a fish hatchery should be constructed, operated, and maintained at Iron Gate Development of a size and capacity to annually hatch and rear 200,000 yearling steelhead trout to a total weight not to exceed 20,000 pounds, 75,000 yearling silver salmon to a total weight not to exceed 5,000 pounds, 6,000,000 fingerling king salmon to a total weight not to exceed 20,000 pounds, and 5,500,000 king salmon swim-up fry; provided, not more than 12,800,000 king salmon eggs should be required to be accommodated in any year at the Iron Gate hatchery facility.

(5) Licensee has constructed a fish trapping and egg collecting station at the Iron Gate Development of sufficient size and capacity to obtain the eggs for supplying a hatchery of the aforesaid size and capacity.

(6) Iron Gate Development will be economically and financially feasible if the aforesaid fish facilities are constructed, operated, and maintained in the manner as hereinafter provided.

(7) The construction, operation, and maintenance of a fish hatchery, as hereinafter provided, of the aforesaid size and capacity is necessary in the public interest

to sustain the anadromous fishery resource of the upper Klamath River at a level approximately equal to that which existed prior to the construction of the Iron Gate Development.

The Commission orders:

(A) The license for Project No. 2082, as amended, is further amended to provide as follows:

Article 49. The Licensee shall construct or arrange for the construction, at its expense, of a fish hatchery at Iron Gate Development, together with supplemental structures and ancillary equipment as detailed in the agreement filed with the Commission on August 17, 1962, by the State of California Department of Fish and Game and the Licensee, of a size and capacity to annually hatch and rear 200,000 yearling steelhead trout to a total weight not to exceed 20,000 pounds, 75,000 yearling silver salmon to a total weight not to exceed 5,000 pounds, 6,000,000 fingerling king salmon to a total weight not to exceed 20,000 pounds, and 5,500,000 king salmon swim-up fry; provided not more than 12,-800,000 king salmon eggs shall be required to be accommodated in any year. Plans for the aforesaid facility shall be prepared by Licensee, in cooperation with the State of California Department of Fish and Game and the U.S. Fish and Wildlife Service, Department of the Interior, and shall be submitted to the Commission for approval within 60 days of the issuance of this order. The facility shall be constructed within one year from the date of approval of the plans by the Commission.

Article 50. Licensee shall reimburse the State of California Department of Fish and Game for 80 percent of the combined annual cost of operation and maintenance of the facilities and appurtenances constructed pursuant to Article 49 and of the permanent fish trapping, collecting, holding, and spawn-taking facilities and appurtenances constructed at Iron Gate Dam. Should Licensee and the State of California Department of Fish and Game fail to agree on the amount to be paid by the Licensee for this purpose, the Commission reserves the right to determine the amount of such annual payment, after notice and opportunity for hearing.

(B) Pending completion of the aforesaid facility, Licensee shall take all reasonable measures to provide for maintenance of the Klamath River fishery resource.

(C) To the extent not inconsistent herewith, the decision of the examiner is affirmed.

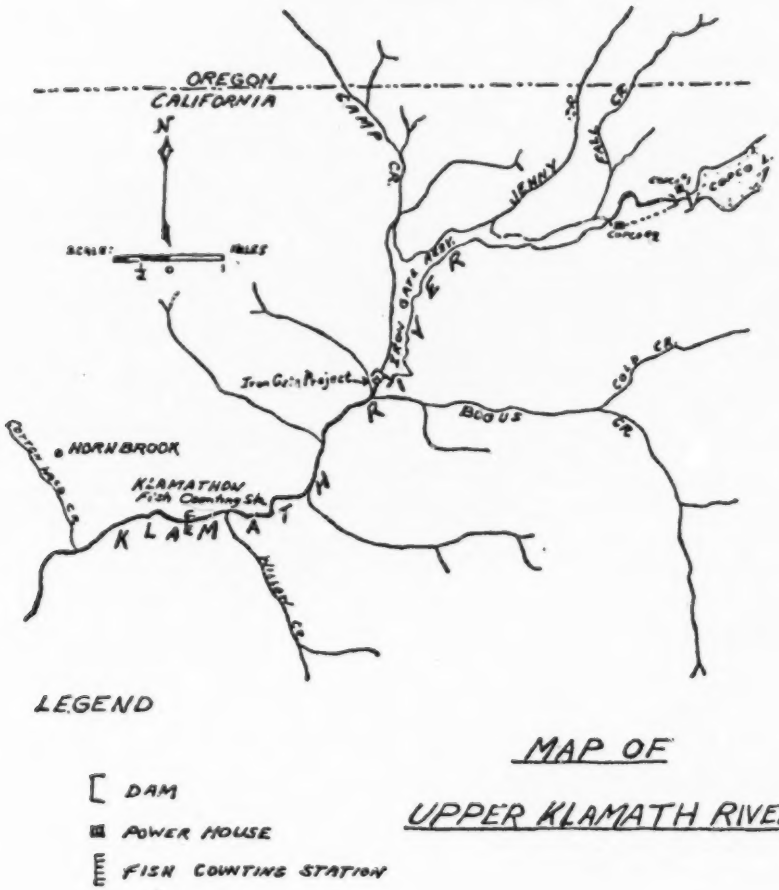
(D) All exceptions to the decision of the examiner not herein granted are hereby denied.

(E) This order amending the license for Project No. 2082 shall become final 30 days from the date of its issuance unless application for rehearing shall be filed as provided in Section 313(a) of the Federal Power Act, and failure to file such an application shall constitute acceptance of this order. In acknowledgment of the acceptance of this order, it shall be signed for Licensee and returned to the Commission within 60 days from the date of its issuance.

INITIAL DECISION

UPON PETITION BY THE STATE OF CALIFORNIA TO REQUIRE LICENSEE TO CONSTRUCT, OPERATE, AND MAINTAIN A FISH HATCHERY

(Issued November 14, 1962)



LEGEND

[DAM

▥ POWER HOUSE

E FISH COUNTING STATION

MAP OF

UPPER KLAMATH RIVER

Levy, *Presiding Examiner:* This proceeding is before the Federal Power Commission by reason of a petition filed by the California Department of Fish and Game (Department) on August 21, 1961, requesting that Pacific Power and Light Company (Licensee) be required to construct, operate, and maintain a fish hatchery at its recently completed Iron Gate Dam (Project No. 2082) pursuant to Article 49 of the license.[1]

The Licensee, in its Answer of September 13, 1961, denied the necessity for any fishery facilities to maintain normal fish runs in the Klamath River, or that it should be required to construct or maintain such facilities. On January 30, 1962, the Commission issued an Order setting the matter down for hearing and prescribing certain prehearing procedures, including the filing and exchange of prepared testimony and exhibits. After the close of the hearing, held June 4th and 5th in San Francisco, Licensee and the Department stipulated, at the request of the Presiding Examiner, to the details of fish hatchery facilities which would be built if required by the Commission. The stipulation filed August 17, 1962 (Appendix A), is without prejudice to the Licensee's position that there is no need for a fish hatchery and that, in any event, it is not liable for construction, operation, or maintenance.

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[1]Article 49 reads as follows:

Article 49. The Licensee shall construct, maintain, and operate or shall arrange for the construction, maintenance, and operation of artificial propagation facilities and such other permanent fish facilities and protective devices including, but not limited to, fish-hauling trucks, fish screens or ladders, and comply with such reasonable modifications in project structures and operation in the interest of fish life as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing.

Background of the Proceeding

The instant proceeding is the latest episode in an extended fishery controversy between the Department and the Licensee[2] that goes back to the construction in 1918 and 1925, of two hydroelectric plants known as Copco No. 1 and Copco No. 2 on the Klamath River in California just below the Oregon border (see Map.) In lieu of a fish ladder the Licensee constructed a fish hatchery at Fall Creek, a short distance down river and, under an agreement with the Department, conveyed the facility to the State of California in March 1919. In 1925, the Licensee constructed and conveyed to the State an egg collecting station at Klamathon some 15 miles downstream.

The Fall Creek hatchery was operated and maintained by the Department until 1948 when "operations were discontinued due to the high cost of maintaining the installation and high operational cost of raising fish". (23 FPC 66) The egg collecting station was continued in operation by the Department until the construction by the Licensee of new egg collecting facilities in March 1962, pursuant to Article 50 of the Iron Gate license.[3]

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[2]"Licensee" also includes, where applicable, Pacific Power and Light Company's predecessor, California Oregon Power Company (Copco).

[3]Article 50 (25 FPC 579, 581) reads as follows:

The Licensee shall construct, concurrently with the construction of Iron Gate Dam, and thereafter operate and maintain permanent fish trapping, collecting, holding, and spawn-taking facilities and appurtenances at or near downstream from Iron Gate Dam as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing.

The hydroelectric plants were operated to meet peak load requirements by alternately storing and releasing water with increasingly severe downstream fluctuations. The Department maintained, and the Presiding Examiner in the license proceeding found, that the fluctuating water levels ". . . have a decidedly detrimental effect on fish and aquatic life." (23 FPC 66)

In 1950 the Department filed suit to compel the Licensee to construct a regulating dam at Iron Gate. After protracted negotiations and the commencement of license[4] proceedings to authorize the construction and operation of a regulating dam, the Department and the Licensee entered into an agreement on July 27, 1959, Exhibit 62 in the license proceeding, under which the Department withdrew its objections to the Iron Gate development as proposed by the Applicant. The agreement provided that the Licensee would construct a dam at Iron Gate for the principal purpose of regulating the flow of water in the Klamath River, and would build fish trapping and egg collecting facilities in accordance with plans and specifications to be furnished by the Department. The necessity for the construction of a fish hatchery at Iron Gate was expressly reserved for future determination.[5] Paragraph 6(b) of the

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[4]The full history of the proceedings in Project No. 2082 is stated in 23 FPC 59, 62 (1960). The license was further amended at 25 FPC 579 (1961) so as to authorize changes in the design from a concrete arch dam to an earth-filled dam, the erection initially to its ultimate height, and reduction in the size of the generator from 25,000 to 18,000 kilowatts.

[5]The Presiding Examiner denied a request by the department for the inclusion in the findings of language which could be construed as implying a determination that fish hatchery facilities ought to be constructed as a condition of the license. (23 FPC 68, 71)

Agreement provides as follows:

> The State, the Department and the Commission shall forthwith cause to be withdrawn and dismissed all protests and interventions with respect to the pending applications of Copco before the Federal Power Commission in Project No. 2082, and before the State Water Rights Board in Application No. 17527; provided, that *the right is reserved to all parties hereto to be heard in any future proceedings in regard to fishery facilities, other than the fish trapping and egg collecting facilities referred to in paragraph 3 thereof.* [Emphasis supplied.]

Construction of the Iron Gate facility, in a single stage rather than the two stage construction originally contemplated, was completed in January 1962 at a cost in excess of $8,000,000. Of this amount more than $700,000 was represented by the cost of building the fish trapping and egg collecting facilities. The Iron Gate Development as completed consists of an earthfill dam about 173 feet high with crest elevation of 2,338 feet, a concrete side channel spillway of the overflow type in the right abutment, a reservoir with normal water surface at elevation 2,328 feet and a capacity of about 58,000 acre-feet, a tunnel through the right abutment which will serve as a sluice and diversion during construction, an intake structure, a power conduit through the left abutment, a penstock, a powerhouse with one 25,000-horsepower turbine connected to an 18,000-kilowatt generator, a substation adjacent to the powerhouse, a 66 kv. transmission line extending to COPCO No. 2 Switchyard, a fish ladder and fish trapping facilities complete with appurtenant facilities, and

other electrical and mechanical facilities. The existing fish facilities are being operated by the Department temporarily, with the consent of the Licensee, pending determination of responsibility for operation and maintenance (See Exh. B attached to California's Reply Brief).

The Issues

The stipulation of August 17, 1962, covering the details of fish hatchery facilities, if required, leaves the following issues for determination:

1. Are additional fish rearing facilities required at Iron Gate to preserve and maintain the fishery resource at a level approximately equal to that which existed before the construction of the Iron Gate Development?

2. If so, who is responsible for construction, operation and maintenance of the fishery facilities?

The Evidence

The Department's experts, fishery biologists Skinner, Croker, Bailey, Hill, and Fraser testified in substance that the Iron Gate Development prevents access by salmon and steelhead to about 16 miles of spawning gravel between Copco Dam and Iron Gate which historically has been utilized by anadromous fish to spawn and reproduce, and that a hatchery is needed to replace these spawning areas which have been eliminated by the construction of the Iron Gate Development. Croker testified that the general trend of salmon runs above Klamathon is downward (Exh. 11-A) and that, based on live fish counts, aerial surveys, carcass and redd counts, 57.1 percent of the fish passing Klamathon spawned above Iron Gate.

Robert Macklin, the Department's Supervisor of Fish Hatcheries, proposed the construction of a fish hatchery

at Iron Gate, based on runs of 15,000 king salmon at Klamathon, designed to incubate, hatch, and rear annually 200,000 yearling steelhead trout, 75,000 yearling silver salmon, and 6,000,000 fingerling king salmon, to a total weight of 121,500 pounds, at an estimated construction cost of $1,003,020, and an annual operating and maintenance cost of approximately $95,256. (Exh. Nos. 6, 7, 8, 9)

J. C. Boyle, Licensee's Vice President, testified in support of the Company's position. Licensee's fishery biologist, Dr. Hamilton, conceded the loss of spawning and rearing areas eliminated by the construction of Iron Gate Dam. His proposed hatchery facilities were smaller and less costly than those proposed by the Department. (Exh. Nos. 15-18, inclusive) The facilities detailed in the stipulation (Appendix A) are also less costly than the Department's original proposals. The total weight of all fish produced is reduced from 121,500 pounds to 50,000 pounds. The holdover of one million fingerlings for fall release is eliminated. Reductions in construction costs are effected by the substitution of rearing ponds for nursery ponds, reduction in the area required to accommodate the hatchery troughs, the number of incubation trays, and the elimination of all of the 14 nursery ponds originally proposed. The Staff estimates that annual operating and maintenance costs will be reduced from $95,256 to $54,278. (Staff br. p. 11)

Discussion

1. Licensee maintains that the Department has not established the need for a fish hatchery at Iron Gate, and questions the accuracy of its estimates as to the number of fish spawning above the Iron Gate Develop-

ment. It argues that normal runs will be sustained by spawning grounds *below* Iron Gate Dam. The testimony indicates, however, that Iron Gate Dam, completed in 1961, prevents access by salmon and steelhead trout to about 16 miles of spawning gravel, thereby eliminating one of the most popular stream fishing areas in the upper Klamath River. (23 FPC, 66, 67) Licensee's fisheries biologist, Dr. Hamilton, conceded that ". . . the Iron Gate reservoir has eliminated whatever salmon and steelhead spawning areas existing between Iron Gate and COPCO Dam . . ." (Tr. 246) and that ". . . about 970 steelhead were trapped at the site this spring after the Iron Gate egg-taking station was put into operation on February 27, 1962." (Tr. 278, 286)

The historic decline of Klamath River king salmon is documented in Exhibit 11-A, the most detailed data of record. While the accuracy of the Department's estimate that 57.1 percent of the fish runs at Klamathon spawned above Iron Gate may be questioned, these estimates are the best available and do support the necessity for additional facilities to replace the lost spawning areas above Iron Gate Dam. I conclude that facilities for the artificial propagation and the perpetuation of the anadromous fish are required at Iron Gate to preserve and maintain the fishery resource at a level approximately equal to that which existed before the construction of the Development. The question remains as to whether a hatchery is required at Iron Gate.

Pursuant to the agreement of July 27, 1959, and Article 50 of the Iron Gate license, (Project No. 2082), Licensee has constructed fish trapping and egg collecting facilities which went into operation on February 27, 1962. The Department argues that without the fur-

ther construction of a hatchery, the egg collecting station is incomplete since "the eggs cannot be simply released back into the river. It is needed as a substitute for [the] natural hatching and incubation process that would normally occur above the Iron Gate Dam had the dam not been constructed." (Tr. 18) The Licensee suggests that any fish which would penetrate the river as far as the Iron Gate Dam will turn back to find suitable spawning grounds down river, and, if this does not maintain the runs, the fish can be transported downstream to other suitable spawning grounds. There is no assurance, however, or evidence that a sufficient number of anadromous fish reaching Iron Gate Dam will turn back and spawn downstream; or that they can be made to do so even if they are trapped and physically transported to downstream areas. In short, I am unable to conclude from the evidence of record that the upper Klamath fish runs can be maintained at an equivalent level without the construction of additional fish rearing facilities. A hatchery[6] is the established method of insuring that the eggs taken from the fish at the trapping facility are properly incubated, hatched, and reared. Licensee's predecessor had constructed a fish hatchery at Fall Creek in 1919, which was operated and maintained by the Department until 1948. I concluded, therefore, that fish hatchery facilities are required to replace natural spawning eliminated by the dam and to complete the fish trapping and egg collecting station heretofore constructed at Iron Gate. Fortunately, the parties have stipulated to the nature of the

[6]The Department's witness, Macklin, testified that 15 hatcheries are being operated by the California Department of Fish and Game. (Tr. 145.)

hatchery facilities to be built if required. These facilities are described in Appendix A, attached hereto and made a part of this decision.

2. The construction costs of the hatchery, as detailed in the stipulation, should be paid for by the Licensee. This is consistent with the agreement between the Licensee and the Department of July 27, 1959 (Exh. 62) pursuant to which the Licensee built the fish trapping and egg collecting facilities. The hatchery will expand the egg collection station into a complete facility for the maintenance of the fishery resource of the upper Klamath River. The agreement provides (para. 3) for the conveyance of the "permanent fish trapping and egg collecting facilities" to be built by the Licensee, ". . . and title thereto, together with the land upon which they are situate . . ." to the State. Similarly, the complementary hatchery should be conveyed to the State to be owned, operated, and maintained by the Department as an integrated fishery facility. The cost of maintenance and operation, however, should be borne by the Department and the State which will now own, control, and operate the entire facility.

The Department argues that the 1959 agreement is not conclusive since it did not expressly agree therein to operate and maintain the fish facilities. The agreement did leave open the issue of hatchery construction and overall operation and maintenance costs. These are the issues to be resolved in this proceeding.

Operation and maintenance by the State is suggested, however, by the following considerations. Historically, the State operated and maintained the Fall Creek fish hatchery constructed by COPCO and conveyed to the

State in 1919, and the fish trapping facilities at Klamathon built by COPCO and conveyed to the State in 1925. The Fall Creek hatchery was abandoned[7] by the Department in 1948 as too costly. The Iron Gate hatchery, which Licensee is now required to build under this order, will substantially replace the Fall Creek hatchery previously operated and maintained by the State.

The Fall Creek hatchery was operated and maintained by the State, as are all 15 State hatcheries, under the California Fish and Game Code. Section 5938 thereof provides in pertinent part:

> Whenever in the opinion of the commission it is impracticable, because of the height of any dam, or other conditions, to construct a fishway over or around the dam, the commission may, in lieu of the fishway, order the owner of the dam completely to equip, within a specified time, on a site to be selected by the department, a hatchery, together with dwellings for help, traps for the taking of fish, and all other equipment necessary to operate a hatchery station, according to plans and specifications furnished by the department. *After such hatchery has been constructed, the department shall operate it without further expense to the owner of the dam except as provided in Sections 5940 and 5941.* [Emphasis supplied.]

The Department argues that the Fish and Game Code of California is inapplicable to a federally licensed power project. The Federal Power Commission has the

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[7] After its abandonment, eggs taken at Klamathon were reared at the Department's Mount Shasta hatchery.

authority under the Federal Power Act, which it has exercised in appropriate circumstances, to require the construction, operation, and maintenance of fish facilities by the Licensee as a condition of the license. State law, policy, and history are, however, relevant considerations in the exercise of such power. The policy of the State of California, as set forth in its Fish and Game Code, is to share in the expense of maintaining fish runs, disrupted by the construction of hydroelectric projects, by operating and maintaining fish hatcheries constructed by the owner of the project at his own expense. This policy is not in conflict with the Federal Power Act or Commission policy. I see no good reason why it should not be followed in this proceeding.

Here the Department by agreement has obligated the Licensee to convey to the State the fish trapping and egg collecting station which it built and the Department is now operating. The fish hatchery when completed should also be conveyed to the State so that its operation can be integrated with the related fishery facilities.

State ownership and control of the Iron Gate fish facilities should carry with it responsibility for the cost of operation and maintenance. This is consistent with California law, with sound fiscal policy, and with the prior pattern on the Upper Klamath.

The Department argues that it is unfair and inequitable to burden California taxpayers with part of the costs of generating power which is distributed and sold interstate. It is not unfair, however, to require taxpayers to participate in the maintenance of a natural resource from which all benefit. The California legis-

lature long ago decided to share in the expense of preserving fish by operating and maintaining hatcheries constructed by the owners of California dams. Moreover, the taxpayers of California also benefit from the construction of licensed power projects. The ratepayers of California and Oregon may well ask why they should be saddled in perpetuity with the unknown and escalating costs of hatcheries operated by the Department, without cost limitations, for the benefit of all citizens and taxpayers. The objective of the Federal Power Act is the maximum development of the entire water resource including power and recreation[8] as well as fish. I am therefore compelled to reject the position of the Department that the Licensee should, in addition to constructing the hatchery, defray *all* operations and maintenance expense The history of this project and the facts in this proceeding suggest otherwise.

The Staff brief is silent in respect of who is to bear the cost of operating and maintaining the egg collecting facility at Iron Gate. The Staff proposes, however, that Licensee and the State share equally in the costs of operating and maintaining the fish hatchery to be constructed at Licensee's expense. The State would continue to pay for the annual operating and maintenance expense attributable to an annual average of 3,000,000 Klamath River king salmon eggs presently hatched and reared at its Mount Shasta hatchery for release into the upper Klamath River.

Licensee and the Department oppose the Staff suggestion; Licensee on the ground that it has no obliga-

[8]The Iron Gate Development has improved the recreational facilities of the upper Klamath by creating a 1,200 acre reservoir available to the public. (Tr. 181-183.)

tion to pay for half the operation and that the Staff proposal is a compromise[9] "unsupported by law or reason". The Department argues that hatchery construction should not be conditioned on their acceptance of the obligation to operate and maintain the facility. I have concluded for all the reasons previously discussed that the Department should pay for the entire cost of maintaining facilities it will own, control, and operate in conjunction with numerous other hatcheries throughout the State.

ADDITIONAL FINDINGS AND CONCLUSIONS

Upon consideration of the entire record in this proceeding, including the pleadings, the evidence adduced, and the briefs filed, it is found and concluded in addition to the findings and conclusions heretofore stated that:

(1) The erection of the Iron Gate development eliminated approximately 16 miles of natural spawning grounds previously used by king salmon, silver salmon, and steelhead trout.

(2) A fish hatchery, the details of which are described in a stipulation filed with the Commission on August 17, 1962, (Appendix A), is required to sustain the anadromous fishery resources of the upper Klamath River at a level approximately equal to that which existed before the construction of the Iron Gate Development.

(3) The public interest in the conservation and the development of the fishery resources affected by the

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[9]The Licensee points out (Reply br. p. 3) that sharing costs will create serious allocation problems with respect to administrative overhead and other costs associated with running the Department and its facilities throughout the State of California.

Iron Gate Development requires the construction of the fish hatchery by the Licensee, and its ownership, operation, and maintenance by the Department as hereinafter provided.

ORDER

WHEREFORE, IT IS ORDERED, pursuant to Articles 49 and 50, Project No. 2082, as amended, subject to review by the Commission that:

(A) The Licensee shall provide for a site and arrange for, and pay for, the construction of a fish hatchery as described in the stipulation filed herein on August 17, 1962, (Appendix A).

(B) Plans for the aforesaid facilities shall be prepared by the Licensee, in cooperation with the State of California Department of Fish and Game, shall be submitted to the Commission for approval within 60 days of the issuance of this Order, and shall be constructed within one year from the date of approval by the Commission. Upon completion of the aforesaid facilities, all the fish facilities shall be conveyed by Licensee to the State; provided that the Licensee shall not be required to reimburse the State of California for the cost of operation and maintenance.

William C. Levy,
Presiding Examiner.

[Appendix "A" to the Presiding Examiner's decision (Stipulation *re* size of hatchery) omitted.]

APPENDIX C.

[30 F.P.C. 499.]

OPINION NO. 381-A

PACIFIC POWER & LIGHT COMPANY,
PROJECT NO. 2082

Opinion and Order on Rehearing and Denial of Motion for Stay
(Issued August 19, 1963)

* * * * *

Before Commissioners: Joseph C. Swidler, Chairman; Howard Morgan, L. J. O'Connor, Jr., Charles R. Ross, and Harold C. Woodward.

On April 10, 1963, Pacific Power & Light Company, licensee for Project No. 2082, applied for rehearing of the Commission's Opinion No. 381 and Order issued on March 14, 1963, 29 FPC 478, in the above-entitled proceeding. A second application for rehearing was filed April 12, 1963, by the Department of Fish and Game of the State of California. By order issued May 3, 1963, rehearing was granted for the limited purpose of affording opportunity for additional consideration. On examination of the rehearing applications we find that while the majority of points raised by Licensee and the Department are merely restatements of arguments raised in their exceptions which have been covered in our Opinion and Order and do not warrant further discussion here, certain aspects of our opinion require clarification.

Licensee urges that amended Article 49 of the license for Project No. 2082, as provided in ordering paragraph (A) of the order accompanying Opinion No.

381, is not in complete conformity with the July 20, 1962 stipulation and distorts the agreed upon provision limiting the number of king salmon eggs required to be accommodated at the Iron Gate hatchery in any one year. Item No. 1 of the stipulation provides in pertinent part:

> 1. If the Commission determines that fish hatchery facilities are required at Iron Gate, said facilities shall be sufficient to accommodate the incubation, hatching, and rearing of the following kinds and numbers of fish each year:
>
> (a) * * * *
>
> (b) * * * *
>
> (c) King salmon (*Oncorhynchus tshawytscha*) Rear up to 6,000,000 fingerlings to a total weight not to exceed 20,000 lbs., and release an additional 5,500,000 swim-up fry. Not more than 12,800,000 king salmon eggs are required to be accommodated in any one year by the Iron Gate hatchery facility; provided, however, if the total number of king salmon eggs taken at the Iron Gate egg collection facility in any one year is equal to or less than 15,800,000, the fish hatchery facilities described herein shall not be required to accommodate more than 81% of the total king salmon eggs taken during the year.

The clause omitted from Article 49 is the portion of Item No. 1(c) which provides that "if the total number of king salmon eggs taken at the Iron Gate egg collection facility in any one year is equal to or less than 15,800,000 the fish hatchery facilities described herein shall not be required to accommodate more than

81% of the total king salmon eggs taken during the year." The Department, in its application for rehearing, specifically acknowledged its responsibility for the hatching and rearing of 19 percent of the king salmon eggs taken at the egg collection station up to 15,800,000 per year[1] as representing the number of eggs formerly reared by the Department in connection with the abandoned Fall Creek hatchery. It was not our intention, in determining the capacity of the hatchery to be constructed at Iron Gate and the number of king salmon eggs to be accommodated therein, to change or modify any of the provisions of the stipulation or to release the Department from a recognized responsibility. No finding was made that deletion of the proviso is required to effectuate the purposes of the Federal Power Act and no such finding could have been made on the record presented in this case. Accordingly, we shall amend our findings and Article 49 of the license to include all provisions contained in Item No. 1(c) of the stipulation.

The Department's exceptions raise objections to certain language in the Commission's opinion which we take this occasion to clarify. In our discussion of the reasons for assigning 20 percent of the operating and maintenance costs of the hatchery to the State, we commented as follows as to the impact of the construction of the Iron Gate Dam:

> * * * To this extent, the river and the enjoyment thereof by the people of the State of California will be enhanced over its original condi-

[1]The Department states that it will defray 100 percent of the cost of rearing any king salmon eggs in excess of 15,000,000 taken in any year.

> tion. Availability of the Iron Gate Reservoir to the public for lake fishing, boating, swimming, and other recreational activities likewise indicates that the advantages to be derived from Licensee's election to construct the Iron Gate Development are not all one-sided. [P. 485.]

The Department's exceptions suggest that the language carries implications which are far reaching and which go beyond our intentions. We therefore wish to restate the Commission's position on the questions raised in the above-quoted sentences to avoid any such misinterpretation.

We do not believe that recreational advantages such as lake fishing, boating and swimming, which are by-products of Licensee's hydroelectric project of general public benefit, should constitute an off-set to the Licensee's responsibility to provide reasonable facilities to maintain the fishery resource of the river, in the absence of prior agreement to that effect by all interested parties or special circumstances not present here. There is much to be said for cooperation by local, state and Federal agencies to provide non-power benefits from multi-purpose projects beyond those which could feasibly be imposed upon an applicant for a license, but this does not apply to the provision of facilities intended to correct for damage to existing resources created by the construction of a project.

As a general rule, a licensee is required to make full recompense for the diminution of a natural resource resulting from a power development on a navigable stream. The evidence presented by the parties established that the construction of Iron Gate Dam will re-

sult in a lessening of the anadromous fish resource in the upper Klamath River and that a hatchery is necessary to counter this effect. A licensee in such circumstances would normally be required to pay all costs involved in restoration of the fish resource, both as incurred in construction of the hatchery and in the yearly costs of operation and maintenance. In this case we shall require the licensee to construct the hatchery entirely at its cost, but there are special circumstances which persuade us that the State should assume 20 percent of the yearly cost of operation and maintenance of all fishery facilities at the development:

(1) The history of this controversy cannot be ignored. The proper apportionment of the cost of operating and maintaining the hatchery should be considered in light of the prior relationship between the State and the licensee with respect to the operation of the Fall Creek Hatchery, in which the State assumed all the expenses of operation. In 1919 after construction was begun on COPCO 1 and COPCO 2, the Fall Creek Hatchery was conveyed to the State, and in 1925 the licensee added fish trapping and egg collecting facilities to the Fall Creek Station. The State operated the Hatchery at State expense until 1948 and the egg collection facility until 1961. Thus, to eliminate any State participation in the operating cost of the Iron Gate Hatchery would be inconsistent with this preexisting pattern.

(2) To impose the full cost of building and operating the hatchery on the Licensee would be to assess costs that would overcompensate for the damage by Licensee's project to the fish population. The evidence in the record suggests that the reregulation of the flow of

Klamath River by the Iron Gate Dam combined with the construction and operation of the hatchery will result in a greater fish population than if Iron Gate had not been built. This would stem from the reduction or elimination of destruction of natural fluctuations and river levels which will follow from the construction of Iron Gate Dam and its operation in accordance with the year-round minimum releases required by Article 52 of the license. To impose on the Licensee the full costs of building and operating the hatchery would not merely restore the status quo but would actually require Licensee to pay for enhancing the fish production as compared with pre-Iron Gate conditions. Apportioning 20 percent of the operating costs to the State will more nearly result in restoring the status quo.

(3) Apportioning this small share of operating costs to the State will provide it with a financial incentive to insure economy of operation of the fish facilities.

The remaining assignments of error contained in the applications now before us do not convince us that we are incorrect in our determinations or, except for amending finding No. 4 and Article 49 to conform to the stipulation, that any further action is necessary on the rehearing other than to affirm our original decision and order.

Licensee had requested separately that it not be required to comply with the provision in the second sentence of Article 49 of the license for Project No. 2082 pending possible judicial review of the Commission's opinion and order. The sentence now provides: "Plans for the aforesaid facility shall be prepared by Licensee, in cooperation with the State of California Department

of Fish and Game and the U.S. Fish and Wildlife Service, Department of the Interior, and shall be submitted to the Commission for approval within 60 days of the issuance of this order." In the alternative, Licensee requested that the time be extended for a short period, designating June 30, 1963. The 60-day period would have expired May 13, 1963, had the running thereof not been tolled by our decision to grant rehearing solely in order to afford additional time to consider the matters set forth in the applications. It does not appear that a brief stay will materially affect the time required for construction of the hatchery. Accordingly, we shall extend the time for Licensee's compliance with the requirements of the quoted provision to October 15, 1963, in line with the request made in the second part of the motion filed April 10, 1963. In all other respects, the motion will be denied.

The Commission further finds:

(1) The assignments of error set forth in the applications for rehearing present no new facts or principles of law which were not fully considered by the Commission when it issued its Opinion No. 381 and Order, or which having now been considered, warrant any change in, modification, or rehearing of such Opinion and Order, except as stated above and specified below.

(2) There is no justification for, and the public interest would not be served by, granting a stay of the order accompanying Opinion No. 381, as herein amended, pending judicial review.

(3) Good cause exists for extending the time for compliance with the second sentence of Article 49, as amended, of the license for Project No. 2082 to October 15, 1963.

The Commission orders:

(A) The assignments of error set forth in the applications for rehearing in the above-entitled proceeding are hereby denied, except to the extent specified below.

(4) To compensate for the loss of the spawning areas described in Finding (3) hereof, a fish hatchery should be constructed, operated, and maintained at Iron Gate Development of a size and capacity to annually hatch and rear 200,000 yearling steelhead trout to a total weight not to exceed 20,000 pounds, 75,000 yearling silver salmon to a total weight not to exceed 5,000 pounds, 6,000,000 fingerling king salmon to a total weight not to exceed 20,000 pounds, and 5,500,000 king salmon swim-up fry; provided, not more than 12,800,000 king salmon eggs should be required to be accommodated in any one year at the Iron Gate hatchery facility; and provided further that if the total number of king salmon eggs taken at the Iron Gate egg collection facility in any one year is equal to or less than 15,800,000, the fish hatchery facilities described herein shall not be required to accommodate more than 81 percent of the total king salmon eggs taken during the year.

(C) Article 49 of the license for Project No. 2082, as amended by our opinion and order issued March 14, 1963, is further amended to provide as follows:

Article 49. The Licensee shall construct or arrange for the construction, at its expense, of a fish hatchery at Iron Gate Development, together with supplemental structures and ancillary equipment as detailed in the agreement filed with the Commission on August 17, 1962, by the State of California Department of Fish and Game and the Licensee, of a size and capacity

to annually hatch and rear 200,000 yearling steelhead trout to a total weight not to exceed 20,000 pounds, 75,000 yearling silver salmon to a total weight not to exceed 5,000 pounds, 6,000,000 fingerling king salmon to a total weight not to exceed 20,000 pounds, and 5,500,000 king salmon swim-up fry; provided not more than 12,800,000 king salmon eggs shall be required to be accommodated in any one year at the Iron Gate hatchery facility; and provided further that if the total number of king salmon eggs taken at the Iron Gate egg collection facility in any one year is equal to or less than 15,800,000, the fish hatchery facilities described herein shall not be required to accommodate more than 81 percent of the total king salmon eggs taken during the year. Plans for the aforesaid facility shall be prepared by Licensee, in cooperation with the State of California Department of Fish and Game and the U.S. Fish and Wildlife Service, Department of the Interior, and shall be submitted to the Commission for approval no later than October 15, 1963. The facility shall be constructed within one year from the date of approval of the plans by the Commission.

(D) The motion filed by Pacific Power & Light Company on April 10, 1963, is denied to the extent that stay is requested pending judicial review.

(E) In all other respects, the original opinion and order issued in these proceedings is affirmed.

Commissioner O'Connor *concurring* in result.

Commissioner Ross *concurring in part and dissenting in part,* filed a separate statement appended hereto.

Commissioner Morgan *dissenting* in part filed a separate statement appended hereto.

Ross, *Commissioner, concurring in part and dissenting in part:*

I concur generally with the statement of Commissioner Morgan, and contend that California should defray only those costs to which it has agreed in the stipulation in this case. In view of the fundamental shift in the majority's approach to a licensee's obligation regarding comprehensive development, a few additional comments are required.

The majority is holding that construction and operation of the fish hatchery, which it alleges overcompensates for the damage inflicted by Licensee's project to the fish population, constitutes a basis for this Commission's imposition of user charges. This holding assumes that the Commission has the authority to allocate, and should allocate, a portion of the costs of these supposed benefits to the people of the State of California.

Such a position opens a Pandora's Box. It means that licensees hereafter have a legal basis for contending that the citizens of any state wherein a hydroelectric power project is constructed which produces nonpower benefits (e.g., flood control, recreation, irrigation, fish and wildlife) should bear some part of the costs of the project which are attributable to the associated nonpower benefits regardless of whether the citizens of a state desire or request such benefits. With the instant opinion as precedent, it is difficult to see how this contention could be rejected.

Adoption of this concept might well be required in the years ahead when relatively less economical hydro sites, from a power aspect, may be developed. However,

in my opinion, this is an extremely important step and Congress must first act and provide a legislative basis for our imposing of part of the costs of such development upon anyone other than the licensee. Once Congress determines that comprehensive development of our water resources requires contributions from the users of nonpower benefits, then the Commission should make the required allocation.[1]

But in the absence of such legislation, we should continue to implement the policy, established by Congress, of requiring licensees to bear all the costs associated with the development of a navigable waterway. The Federal Power Act reflects the philosophy that any development must be consistent with a comprehensive plan of development, i.e., that which provides the greatest benefits—power and nonpower alike. The framers of the Act wisely insisted on comprehensive development as the *quid pro quo* of granting the right to private parties to use our nation's water resources for commercial purposes. This Commission should not waive this hard fought concession to the public interest.

For these additional reasons, I respectfully dissent to the majority's decision to the extent that it allocates 20 percent of the operating costs of the Iron Gate fish facilities to the State of California.

Morgan, *Commissioner, dissenting in part:*

I dissent from my colleagues' denial of the remedial relief requested by the petition of the Department of Fish and Game of the State of California for rehearing

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[1]In this connection, I believe that any user charges should be imposed upon a statewide or national basis, depending upon whether the benefits are limited to the residents of a particular state or are available to all citizens.

and, upon reconsideration, I must dissent from that portion of Opinion No. 381 which requires the Department to pay 20% of the total cost of operating and maintaining the Iron Gate fish facilities.

By its petition for rehearing the Department has made it clear that it only offered, in its stipulation with the Licensee, to bear the cost of rearing 19% of the king salmon eggs taken at the Iron Gate fish facilities; and not *an additional* 19% or 20% of the entire cost of operating and maintaining hatchery facilities for the rearing of the remaining 81% of the king salmon eggs plus the eggs of additional species. Yet this is what the majority has attempted to force the State of California to do.

I cannot say whether my colleagues' decision to order the Department to assume 19% (in round numbers, 20%) of the *full* cost of operating those facilities was based on the mistaken belief that the Department had volunteered to do so. But I must say that mine was. Nor can I say whether my failure to recognize the Department's specific limitation on that 19% was due to the truncated record in this case, or to failure by the Department to make its limitation clear, or to inadequate analysis of the Department's proposal and the record herein.[1]

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[1]However self-evident the facts and the law on this point may have been to the Department, it is now clear that to obviate confusion in minds more hurried and less familiar with the background facts than their own, the Department should have continued the method of making the governing distinction that it used in its Reply Brief before the examiner. It there treated the matter as follows (at p. 23):

> Whenever maintenance and operation costs and hatchery costs have been mentioned in this brief, such expense excludes 19% of the king salmon eggs taken at Iron Gate. This was done for the sake of brevity, so that continual reference would not have to be made throughout this brief to the exception of 19%.

I have never knowingly departed, as some of my colleagues here depart, from that principle of resource development (explicitly set forth as Section 18 of the Federal Power Act) which requires licensees to conserve or to compensate for all resource values impaired, damaged or diminished by their use of the Nation's streams for generating electric power. My apparent willingness to do so in Opinion No. 381 was based solely upon the belief that the State of California—by way of settlement and for reasons best known to itself and not shown upon the record—had agreed to pay 19% of the cost of offsetting the damage that Licensee's Iron Gate Dam caused to the fish resources of the Klamath River.

I considered and believed that the 20% figure selected by my colleagues and here reiterated by the majority was a departure of only a single percentile from an agreement entered into by the State of California with the Licensee and that the difference, while supported by no rational explanation whatsoever, was *de minimis*. Accordingly, and solely in order to reach a decision I believed to represent no significant departure from principle, I concurred in their arbitrary selection of that figure.

But, as the supplementary pleading filed by California now makes abundantly clear, my belief was mistaken. That pleading now leaves us with no alternative

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During its oral presentation before the full Commission, the Department did not similarly limit or qualify its response when asked if it maintained that Licensee should be required ". . . to pay the whole cost of this hatchery?" Although the limitation or qualification is implicit in the remainder of the Department's response, its reply nevertheless was specific: "We are only asking them to pay for 81 percent of it." (Tr., page 339.) It is now clear that this was mere ellipsis.

but to remedy our error by requiring the Licensee to compensate the public in full for the damage inflicted; and the majority's obdurate refusal to do so here requires my most respectful but total dissent. Although the amount of money involved is negligible, the majority's refusal to vindicate the principle involved is a policy aberration of alarming precedential significance.

By themselves, the incidental flood control and recreation "benefits" that allegedly result from the existence of the Iron Gate Dam, although sharply disputed by the Department, essentially are nothing more than the inevitable results of the performance of licensee's duty to re-regulate stream flow fluctuations caused by its COPCO plant. As long as it was mistakenly assumed that the State had undertaken to defray a portion of the particular costs in question, the recital of those "benefits" in Opinion No. 381 (although objectionable to me) was in the nature of dicta and did not call for my dissent. However, those alleged, unsolicited "benefits"—"benefits" unwanted and unneeded prior to the building of Licensee's projects—are plainly no substitute for Licensee's duty to compensate for its impairment of Klamath *fish* resources; and I here dissent from any attempt to make them serve as such in law.[2]

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[2]In Opinion No. 381 (at page 485) language appears which clearly shows that the Commission in that Opinion was balancing off alleged recreational "benefits" of Iron Gate to the State against the cost of remedial measures for the protection of fish resources to which the Licensee was obligated. In this present order the majority (at page 501) labors to assure us that it considers such a balancing to be improper and not to be contemplated under the Act. Yet here the majority reaches the same conclusion and the same division of costs between the parties as in Opinion No. 381! Can anyone explain these results?

The operative facts of this specific matter, the emergent issue, and the applicable law now are unmistakably clear. Since 1919 the existence of the barriers caused by Licensee's COPCO projects, together with Licensee's failure to shoulder its proper responsibility under Federal law, required the Department to maintain and pay the operating costs of an artificial hatchery facility to accommodate some 3 million king salmon eggs produced by Klamath River fish whose upstream passage had been blocked by those dams for more than 40 years. From 1919 until it was abandoned as uneconomical in 1948, the Department conducted this service at the Fall Creek hatchery. Since then, and by employing tank truck transport, the Department has utilized its hatchery at Mount Shasta to accommodate the eggs formerly propagated at Fall Creek, and it has voluntarily agreed to go on doing so. These eggs comprise an annual average of 19% of the king salmon eggs which will be taken below Iron Gate. However, the existence of the Iron Gate Dam (completed in 1962) now constitutes a barrier to the migration not only of the 3,000 king salmon which produce those eggs *but, in addition, some 12,800 additional king salmon as well as several other species!*

A new hatchery is needed to accommodate the eggs produced by these additional fish if the annual runs are to be preserved, and the State of California has no obligation whatever to pay any of the costs thereof.

I think they can be explained, but it would be difficult to do so in a manner which lends stature to the majority's candor or objectivity.

The majority feels entirely free to abandon its original arguments. It does not feel at all free to abandon its original conclusion, even in the face of obvious difficulty in making that old conclusion square with the new or remaining arguments. We may be pardoned, I think, for asking what is going on here.

The obligation to defray *these* costs rests exclusively on the Licensee.

The record shows all this clearly, and because it does, we found and ordered that the Licensee must construct a hatchery to accommodate all fish runs impaired or blocked by Iron Gate, except those 3 million Fall Creek king salmon eggs that the Department historically has provided for and has voluntarily agreed to continue providing for. Responsibility for *operation* of this new Iron Gate fish hatchery follows *a fortiori* from the same reason and rule that compels us to require Licensee to *construct* that hatchery.

However, and intentionally or unintentionally, by distorting the Department's willingness to continue to provide for the 3 million Fall Creek king salmon eggs it has provided for historically—which comprise 19% of the total king salmon run impaired by Iron Gate—the majority rules that the State of California must pay 20% of the *entire cost* of operating the hatchery we have decided Licensee must build to accommodate the fish runs blocked by erection of Iron Gate. This, it is now clear, is *over and above* the outlay the State has voluntarily agreed to continue making in order to provide for the 3 million king salmon eggs discussed above.

No valid reason is given for this decision. The record before us cannot provide a reason for this decision—with the exception of the reason clearly illuminated by the briefs, arguments and petition of the State of California: that the terms, effect and purpose of the agreement entered into by the State of California and the Licensee were misunderstood.

To misunderstand may be embarrassing, though it need not be so in this case: counsel for the State of

California must bear some responsibility for the misunderstanding here. But to attempt to rationalize, defend and perpetuate a misunderstanding is inexcusable. And to do so in circumstances which produce a dangerous precedent adverse to a valuable principle is outrageous.

The majority now rests the conclusions it previously set forth in Opinion No. 381 on the following bases:

> 1. The history of this controversy cannot be ignored. The proper apportionment of the cost of operating and maintaining the hatchery should be considered in light of the prior relationship between the State and the licensee with respect to the operation of the Fall Creek Hatchery, in which the State assumed all the expenses of operation. In 1919 after construction was begun on COPCO 1 and COPCO 2, the Fall Creek Hatchery was conveyed to the State, and in 1925 the licensee added fish trapping and egg collecting facilities to the Fall Creek Station. The State operated the Hatchery at State expense until 1948 and the egg collection facility until 1961. Thus, to eliminate any State participation in the operating cost of the Iron Gate Hatchery would be inconsistent with this pre-existing pattern. [P. 502.]

Indeed we should not lose sight of the history of this controversy! But the use the majority opinion makes of that history in an attempt to justify its mistaken conclusions is little short of incredible.

"This controversy," Opinion No. 381 explains at page 479, involves the question of whether Licensee should be required "to erect and maintain a fish

hatchery . . . to continue the runs of salmon and steelhead trout *which have been displaced by Licensee's construction of its Iron Gate Development on the Klamath River*" seven miles below COPCO No. 2 [emphasis added].

Iron Gate was licensed in 1957; its construction was completed in January 1962; and in Opinion No. 381 we found that it constitutes an impassable barrier to all fish that formerly spawned in the eight miles between Iron Gate and COPCO No. 2. There is no controversy here. Opinion No. 381 settled the matter.

Nor is there any controversy here over who will pay to hatch the eggs of the fish whose upstream passage was blocked by COPCO No. 2 in the past and which is now blocked eight miles downstream (along with the upstream passage of many other fish) by the new Iron Gate barrier. The State always paid to hatch the eggs of the fish formerly blocked by COPCO No. 2 and the State proposes to continue to do so. The eggs of the fish formerly blocked by COPCO No. 2 and now blocked by Iron Gate comprise 19% of the 15.8 million eggs of king salmon blocked by Iron Gate; so the State has volunteered to bear the expense of hatching 19% (or 3 million) of the 15.8 million eggs of king salmon blocked by Iron Gate. Plainly, the Federal Power Act never requested the State to defray the cost of hatching those 3 million eggs in the past: and plainly that Act does not require the State to do so now that the COPCO plants have been put under license and made subject to the comprehensive development requirements of Section 10(a) and Section 18 of the Act. Nevertheless, the State has volunteered to pay the cost of hatching those 3 million eggs, and there is no question or controversy over that matter here.

This controversy only relates to who should bear the cost of operating and maintaining a hatchery big enough to hatch the eggs of only those fish that formerly spawned in the eight-mile stretch between Iron Gate and COPCO No. 2. There is not even any dispute as to the number and weight of fish that the hatchery must hatch: the parties have stipulated the size of a hatchery sufficient to hold the eggs of only those fish that previously spawned in "the lost spawning areas above Iron Gate" and below the COPCO No. 2 facilities (Examiner at pp. 490-491, Opinion No. 381 at pp. 482-483). We found that "since Licensee has created the situation which necessitates [a] fish hatchery" adequate to hold the eggs of (only) the stipulated number of fish that previously spawned in the gravels above Iron Gate, "it is no more than reasonable to require it to pay the cost of construction thereof." Thus there is no controversy with respect to construction of the hatchery.

Licensee argued that we should not require it to pay the cost of operating and maintaining the (stipulated) hatchery, because state law says the state will do so and because the state paid the cost of operating the old (3 million egg) COPCO hatchery at another reach of the River. In Opinion No. 381 we said those historic matters are "wholly immaterial," because (a) "the Federal government, in its enactment of the Federal Power Act has occupied the entire field"; and (b) because "the Fish and Wildlife Coordination Act . . . contemplates that power companies operating under a federal license would be required to make adequate provision for fish conservation as a condition of the license." We did not feel it was necessary to explain that the comprehensive

development standard of Section 10(a) of the Act means that if *Licensee's use* of the waters to develop electricity results in damage to fish or other resources, *Licensee* must pay for facilities to preserve them; and we did not feel it was necessary to point out that Section 18 of the Act says that "the Commission shall require the construction, maintenance and operation by a licensee at its own expense of . . . such fishways as may be prescribed . . ."

Now the majority contradicts itself. Contrary to its own exposition of the requirements of the Act, the majority now says that the State must help pay to preserve a resource damaged by a re-regulating hydroelectric plant licensed by us in 1957, because in the past and under a discredited, inapplicable state law, the State had to pay to preserve a different and separate fish resource impaired by an unlicensed plant, built before enactment of the Federal Power Act, in a different reach of the River.

I heartily dissent from this contradiction; and totally disassociate myself from the majority's attempt to obfuscate and conceal the operative facts of this controversy. The majority need not stoop to conquer.

The majority then proceeds to its next major point:

> 2. To impose the full cost of building and operating the hatchery on the Licensee would be to assess costs that would overcompensate for the damage of Licensee's project to the fish population. The evidence in the record suggests that the re-regulation of the flow of Klamath River by the Iron Gate Dam combined with the construction and operation of the hatchery will result in a greater fish population than if Iron Gate had not

> been built. This would stem from the reduction or elimination of destruction of natural fluctuations and river levels which will follow from the construction of Iron Gate Dam and its operation in accordance with the year-round minimum releases required by Article 52 of the license. To impose on the Licensee the full costs of building and operating the hatchery would not merely restore the *status quo* but would actually require Licensee to pay for enhancing the fish production as compared with pre-Iron Gate conditions. Apportioning 20 percent of the operating costs to the State will more nearly result in restoring the *status quo*. [P. 502.]

The stipulation entered into by the parties to this proceeding provides that: "(1) if the Commission determines that fish hatchery facilities are required at Iron Gate, said facilities shall be sufficient to accommodate . . ." the stated number of fish whose spawning grounds were blocked by Iron Gate.

The Commission, in Opinion No. 381, found that a fish hatchery was required at Iron Gate; and that a hatchery of the stipulated size will "preserve and maintain [the fish resources] *at a level approximately equal to that which existed prior to the construction of the Iron Gate Development*" [emphasis added].

The Commission failed to find that re-regulation of the River will improve the fish resource over its condition prior to Iron Gate, because the record contained no evidence whatsoever to support such a finding. It does not contain any now. Further, contrary to the majority's empty assertion here, the record does not even "suggest" that re-regulation and the hatchery com-

bined "will result in a greater fish population than if Iron Gate had not been built."

Obviously, if the majority's present "reasoning" is to hold water, it must rest on findings of fact, and those findings in turn must be based on a preponderance of solid evidence in the record before us. Neither the findings nor the evidence upon which to base them can be pointed out.

Here again, therefore, the majority fails in its attempt to manufacture now a reason why—contrary to the record evidence, its own findings, and the requirements of the Federal Power Act—it ordered California to pay 20% of the cost of operating and maintaining the project facilities that the comprehensive development standards of the Federal Power Act require Licensee to maintain.

Finally the majority rests its order on the following:

> 3. Apportioning this small share of operating costs to the State will provide it with a financial incentive to insure economy of operation of the fish facilities. [P. 502.]

Here the majority discloses what it now insists was a central purpose underlying its imposition of 19% (rounded to 20%) of the O & M costs of the fish hatchery on the State of California. That purpose was to protect the Licensee from assumed extravagance on the part of the State. The question of the ethics of the State of California was not made an issue in the proceeding but apart from this the requirement that the State must pay 20% would *very likely* achieve the desired result. We may likewise assume that if the Commission were to require the State to pay 100%

of the O & M costs it would *almost certainly* achieve the desired result. Better still, if the Commission were to require the State to pay the Licensee 200% of the O & M costs it would *certainly* achieve the desired result.

But this exhilarating vista of expanding Commission jurisdiction over the sovereign states (in order to protect Licensees from conjectural expense) evaporates when a simple question is asked: What is the statutory authority for the Commission to impose such a charge on the State? The answer is: No such authority exists in law.

I agree that the Licensee is entitled to protection against State extravagance, whether real or fancied. Such protection is afforded by the arrangement, which has been operating successfully for years, between the Department of the Interior and California as well as a number of other States. Under this arrangement the Department builds hatcheries to correct damage to State fishery resources caused by its dams, turns those hatcheries over to the State and reimburses the State for operation and maintenance. Prior to the beginning of each fiscal year a budget conference between the State and the Department is held for the purpose of reaching agreement on operation of each hatchery during the coming year, and the hatchery is operated in accordance with that annual budgetary agreement.

Such an arrangement could properly be required as a license condition here, and the Commission could reserve the right to settle any dispute which prevents agreement in the unlikely event such a dispute were to occur. This is the pattern suggested by California during oral argument. It is the pattern we should

have adopted here. It is equitable; it provides all the protection needed by the Licensee; and it does *not* require the Commission to exceed its statutory powers.

* * * * *

In sum, the majority defends its ruling that California should bear 19% (rounded to 20%) of the hatchery O & M costs by citing: (1) a history of the controversy which the majority clearly misunderstood and misapplied, (2) an hallucinatory claim that such costs would exactly balance an unproved "over-compensation" of the State by the Licensee, and (3) a claim that imposition of such costs is necessary to preserve California's virtue.

Let us examine item (2) at greater length, though the temptation is great to discourse further on all three.

If my reading of the majority's reason No. 2 is correct, it is as follows: The parties in this controversy have agreed upon the size of the hatchery to be built, but their agreement was in error. Further, the majority knows the nature and direction of the error: the hatchery agreed upon is not too small; it is too large. It is too large because that hatchery, in combination with future improved conditions in the spawning beds below Iron Gate will, in the course of time, result in the propagation of more fish in the future than before Iron Gate was built. Further, the majority knows exactly how many more fish will be propagated in the future than before Iron Gate was built, as well as the *value* of those additional fish. Therefore the majority feels able to correct, with precision, the error made by the parties to the agreement. It finds, on the basis of no evidence beyond the foregoing assertions, that

experience *in future years* will demonstrate that Iron Gate re-regulation, plus a too-large fish hatchery, will overcompensate California by exactly the amount equal 19% (rounded to 20%) of the cost of operating and maintaining the stipulated fish hatchery!

I freely confess that I lack both the evidence and the expertise necessary to make such daring yet meticulous calculations involving the life and behavior of generations of fish yet unborn, and the operation of facilities yet unbuilt. If I possessed such expertise and evidence I might have been tempted to correct the (assumed) error of the parties by the simpler method of adjusting the size of the hatchery those parties had already agreed to.

If the majority really possessed this dazzlingly intuitive expertise I am confident they too would have made such a correction. But they did not. It matters little whether we conclude they failed to do so because they had neither the expertise nor the evidence on which to act, or because they are here merely attempting to rationalize a misunderstanding.

What is important is that they lacked the authority to do what they decided to do.

* * * * *

A clear understanding of and correct ruling on this matter can be achieved by the reading of a simple and undisputed statement of fact, plus the answers to two simple questions. The simple statement of fact is as follows: The fishery facility we have prescribed and have ordered Licensee to build is required in order to correct and repair damage inflicted on the fishery resource of the Klamath River in California by the Iron Gate Dam constructed by Licensee.

Question number one: How much of this damage resulted from activities of the people of the State of California? Answer: None.

Question number two: What proportion of the cost of repairing this damage should be borne by the people of the State of California? Answer: None.

The majority, by an indirect, oblique approach, attempts to lend the authority of this Commission to a new and alarming theory—that a Licensee, without the agreement or consent of a sovereign State, may impose charges on the State for asserted but disputed and unwanted "benefits" arising indirectly from Licensee's use of the Nation's rivers for the generation of electric power; and that this Commission, under the Federal Power Act, has the authority to force the State to bear those charges against its will.

If the majority seriously believes it lawfully has this power—which I maintain it does not—it should (attempt to) assert that power openly, citing statutory authority, rather than attempt to establish such power obliquely, as it does here, by entangling its new theory with a legitimate dispute over the proper responsibility of a Licensee to repair and correct damages it has inflicted upon a natural resource of the State of California.

I believe the majority's attempt to establish such a theory will fail, regardless of whether it is made openly or as in this proceeding, and I concur in the dissenting remarks of Commissioner Ross on this subject.

The one question properly before us is the responsibility of Licensee to protect and conserve the fishery resource of the Klamath River in California.

This Commission has committed a serious error, and in doing so has set a precedent dangerous to the rights of the several States and their citizens, by attempting to force the people of California to pay costs not rightly theirs, for damages not inflicted by them, upon a resource they have every right to enjoy unimpaired. There is an obligation to pay for correcting the damage inflicted on that resource by Licensee's project. But that obligation rests squarely on the Licensee. Not one iota of that responsibility rests upon the public.

If Licensee and the State of California *had* entered into an agreement to share the costs of meeting that responsibility in the manner mistakenly understood to be the case on first presentation of this matter before us, this Commission would have had adequate statutory authority to examine such an agreement and decide whether its impact *on Licensee's customers* did or did not serve the public interest. But, as is now clear, *there was no such agreement,* and we have not the slightest shred of statutory authority to concoct a substitute therefor and then proceed to force the State of California, against its determination of the public interest and against its will, *to accept it and require its taxpayers to pay for it.*

The majority's attempt to force the people of California to do more than they voluntarily agreed to do is wrong and cannot be supported by facts, by logic or by law. I am confident that on review their attempt will be struck down by the courts, as it should be.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 659

PACIFIC POWER & LIGHT COMPANY,
Petitioner,

vs.

FEDERAL POWER COMMISSION,
Respondent.

Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Conditional Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

If the Court deems ripe for determination the questions presented by the petition for writ of certiorari filed on behalf of the Department of Fish and Game of the State of California (Department) in No. 648, October Term, 1964 (*Department of Fish and Game of the State of California v. Federal Power Commission*), which seeks review of the judgment of the United States Court of Appeals for the Ninth Circuit in Nos. 18853 and 18954, Petitioner Pacific Power & Light Company (Pacific) prays that a cross-writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit in Nos. 18853 and 18954 to consider the questions raised in this petition.

OPINIONS BELOW

The decision of the Presiding Examiner (R. 381)* is unreported. Federal Power Commission Opinion No. 381 (R. 397) is reported at 29 F.P.C. 478 and 47 PUR 3d 398. Federal Power Commission Opinion No. 381-A (R. 436), rendered on rehearing, is reported at 29 F.P.C. 478 and 50 PUR 3d 171. The opinion of the Court of Appeals (R. 508) is reported at 333 F.2d 689 and is attached hereto as an appendix.

JURISDICTION

The judgment of the Court of Appeals was entered June 8, 1964 (R. 522). The order of the Court of Appeals denying the respective petitions for rehearing filed by Pacific and by the California Department of Fish and Game was entered on August 6, 1964 (R. 523). On October 26, 1964, Mr. Justice Douglas extended Pacific's time to file this petition to and including November 9, 1964. Jurisdiction of this Court rests on 28 U.S.C. § 1254(1) and upon Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b).

QUESTIONS PRESENTED

1. May the Federal Power Commission order Pacific, a federal power licensee, to convey a fish hatchery to the State of California and to reimburse the State for the cost of operating and maintaining the hatchery without any evidence, findings or reasons to support such order?

2. May the Federal Power Commission or the Court of Appeals abrogate a contract between Pacific and the State of California by virtue of which the State would operate all fishery facilities operated by Pacific without reimbursement from Pacific?

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*All record references are to record heretofore certified to this Court by Clerk of Court of Appeals for Ninth Circuit in Nos. 18853 and 18954 of that court.

3. May the Court of Appeals on remand to the Federal Power Commission invite the Commission to alter its order requiring Pacific to reimburse the State of California for 80% of the cost of operating and maintaining a fish hatchery without first concluding that the order of the Commission is in some respect beyond its discretion or contrary to law?

STATUTES INVOLVED

The essential statutory provision involved in this proceeding is Section 10(a) of the Federal Power Act, 41 Stat. 1068 (1920), as amended, 16 U.S.C. § 803(a), which provides as follows:

> "All licenses issued under [the Federal Power Act] shall be on the following conditions:
>
> "(a) That the project adopted, including the maps, plans, and specifications, shall be such as in the judgment of the Commission will be best adapted to a comprehensive plan for improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and for other beneficial public uses, including recreational purposes; and if necessary in order to secure such plan the Commission shall have authority to require the modification of any project and of the plans and specifications of the project works before approval."

STATEMENT

Pacific* owns a series of hydroelectric plants on the Klamath River in Oregon and California, all covered by one license, issued by Respondent Commission pursuant to

*Until 1961, the hydroelectric developments here involved were owned by The California Oregon Power Company, often referred to in the record as "Copco". The term "Pacific" embraces the present Licensee (which became the owner of the project upon Commission approved merger in 1961) and its predecessors. The term "Department" includes the various predecessor agencies of the Department of Fish and Game.

Section 4(e) of the Federal Power Act, 16 U.S.C. § 797(e), and collectively designated Project No. 2082.

At the time the two lower-most of these plants, called the Copco plants, were constructed in the early Twenties, Pacific built fish hatchery and egg collecting facilities which were conveyed to the State for it to operate and maintain pursuant to state law without further reimbursement from Pacific. It was regarded by the State that Pacific's obligation for preservation of the fishery had been discharged. (R. 161-62, 292.) Nevertheless, some 20 years later complaints were made that fluctuations in the Klamath River below the plants arising from normal operation of the Copco plants had an adverse effect upon fish runs in the river. Thereafter, the California Department of Fish and Game (Department) filed an action in the state court to abate the alleged fluctuation nuisance. (R. 164-65.)

By written agreement dated July 27, 1959, Pacific and the Department agreed to settle their differences (R. 260-67). In return for the Department's dismissal of the state court suit and its agreement never to make further claims against Pacific for "damages or any other relief" arising from the alleged fluctuation nuisance (R. 265), Pacific agreed to construct a re-regulating dam some six miles below the Copco plants on the Klamath at Iron Gate and to construct egg collecting facilities there for the Department to operate in connection with its fish hatchery operations throughout the State (R. 262-63). The agreement preserved the right of the State to later claim that a fish hatchery was also required (R. 265). While it was contemplated by the parties that any fishery facilities constructed at Iron Gate would be operated by the Department, nothing in the agreement required Pacific to reimburse the Department for the cost of operation and maintenance of any facilities. (R. 74-76, 263.)

The Commission determined that the project was best adapted to development of the waterway, the licenses were issued (R. 331-57), the dam and egg-collecting facilities were constructed at a cost to Pacific of in excess of $8,000,000, and the conditions for anadromous fish in the river were significantly improved. In addition, the dam has created a reservoir of some 1,200 acres available to the public for swimming, boating and lake fishing, thereby vastly improving the recreational facilities of the entire upper Klamath River area. (R. 168-71.)

On August 21, 1961, the Department filed a petition with the Commission requesting, in effect, that Pacific be required to construct a fish hatchery at the cost of an additional million dollars, convey the hatchery to the State, and reimburse the State for the estimated $100,000 annual cost of operating and maintaining the fish hatchery at Iron Gate as well as the egg collecting facility which was then nearing completion and which the Department in fact commenced to operate in February 1962 (R. 366-69).

By his initial decision entered November 14, 1962, the examiner held that Pacific should be required to construct a hatchery and to convey it to the State on the condition that the State agree to operate and maintain the hatchery without reimbursement from Pacific (R. 381-93).

By its Opinion No. 381 (R. 397-412), as amended on rehearing by Opinion No. 381-A (R. 436-59) the Commission ordered Pacific to construct a fish hatchery, convey it to the Department,* and to reimburse the Department for 80% of the cost of operating and maintaining the hatchery as well as the egg collecting facility already being operated by the Department. The Commission made no findings, and there

*The Commission did not itself expressly order conveyance of the fish hatchery; however, as the Court of Appeals noted, this requirement was implicit in the order (R. 515).

was no evidence, that operation of the hatchery by the Department, rather than by Pacific, was required in the interests of preserving the fishery or that reimbursement of the State by Pacific was required to secure operation of the hatchery or of the egg collecting facility.

After denial of their respective petitions for rehearing, Pacific and the Department each filed a petition to review the order of the Commission pursuant to Section 313(b) of the Federal Power Act, 16 U.S.C. § 825 *l* (b) (R. 468-78, 479-94). Pacific contended, *inter alia*, that the Commission erred in requiring Pacific to convey its hatchery to the Department and to reimburse the Department for 80% of the cost of operating and maintaining the hatchery or the egg collecting facility. The Department contended that Pacific should be obligated to reimburse it for 100% of such costs. The two petitions were consolidated for hearing on a single record (R. 495).

The court in most respects sustained the order of the Commission, but it remanded to the Commission for further determinations. The decision of the court below is erroneous in the following respects:

1. The court held that the Commission might require Pacific to convey the hatchery to the State and to reimburse the State for its cost of operation and maintenance *without any finding or evidence that such was necessary to achieve the objectives of the Act.* According to the court, so long as the objective which "the Commission seeks here is one that the Congress has authorized it to seek", the Commission may choose any means "reasonably adapted to achieve the authorized end" (R. 515).

2. The court misconstrued the release and settlement agreement between Pacific and the Department and thereby abridged Pacific's contractual right to have the Department

pay for the cost of operating and maintaining the *fish hatchery* (R. 517). Having done so, the court remanded to the Commission for it to determine whether there was "any evidence that would support a finding of reasons to disregard" the provisions of the same contract which the court conceded require the Department to pay for operation and maintenance of the *egg collecting facility* (R. 519).

3. Having properly rejected the Department's contention that the Commission is obligated by law to place the full burden of operation and maintenance costs upon Pacific, the court then erroneously asserted that the order was ambiguous and remanded to the Commission "for such clarification" of its order as it might desire to make. The court's remand was a patent invitation for the Commission to revise its decision for no reason. As such, it was an unwarranted interference with administrative discretion.

REASONS FOR GRANTING THE CROSS-WRIT

Pacific believes that its obligations with respect to reimbursement of the State of California for the cost of operating and maintaining fishery facilities at Iron Gate will not be finally determined until further deliberations have been had by the Commission. Although convinced that the court's decision is incorrect, Pacific would not have petitioned for certiorari at this time had the Department not done so.

Nevertheless, if the case is to come here at all, then the whole case should come in the interests of sound judicial administration. Moreover, the issues presented in this petition are of greater importance than any raised by the Department's petition.

The Commission's Order Is Unsupported by Findings, Reasons or Evidence.

The Commission's order requiring Pacific to convey its hatchery to the State and reimburse the State for a portion

of its cost incurred in operating the fish hatchery is not supported by any reason for doing so or by any finding that such is required to secure operation of the hatchery.

Pursuant to its conceded powers under Section 10(a), the Commission ordered Pacific to build a hatchery, and in the normal case it would look to Pacific for the operation and maintenance of that hatchery. But in this case the Department requested that the hatchery be given to it to operate and maintain. In response to that request, the Commission ordered the hatchery transferred to the Department without any finding or evidence to support the need for doing so.

Having thus taken Pacific's hatchery without its consent, the Commission ordered Pacific to pay money to the State in perpetuity to support operation and maintenance of the hatchery. Again there was no finding that such was required to secure operation of the hatchery or evidence to support such finding.

We submit that this action taken without findings or evidence took the Commission far beyond the realm of preserving the natural resource and was a naked intrusion into the relationships existing between Pacific and the State of California.* It has done so without any finding that any policy under the Act so requires. So to do, clearly transcends the Commission's power under the Act.

In the face of this complete lack of findings or reasons to support the Commission's order, the court fashioned a new doctrine under which no findings are required.† Accord-

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*In the normal course of events, Pacific would have operated the hatchery. However, if the Department had requested Pacific to transfer its hatchery to the State, Pacific would have done so, but on condition that the Department agree to operate and maintain the hatchery. By accepting the hatchery, the Department would have become fully obligated to operate and maintain it at State expense.

†The Court also suggested that the Commission might have found that the State's competence" and "willingness" to operate a hatchery were such that development of the natural resources

ing to the court, so long as the "objective that the Commission seeks here is one that Congress has authorized it to seek", the choice of means rests entirely with the Commission and need not be suported by findings. (R. 515) This erroneous doctrine should be rejected by this Court and its application to Pacific herein reversed for a number of reasons.

1. In the name of this erroneous doctrine, a substantial portion of Pacific's property has been confiscated in contravention of Pacific's rights guaranteed by the Fifth Amendment.

2. The doctrine announced by the court below has much greater potentialities than its application to Pacific in this case. Under this doctrine, any of Pacific's property which might in the future be constructed pursuant to Commission license could be similarly confiscated by the Commission, and so could such property of any other federal power licensee. The Commission need only conclude that the object sought by the Commission, to wit, the operation of such property, is authorized by Congress. Upon such findings the Commission is thus free to order conveyance of such property to the State and reimbursement to the State in perpetuity for the cost of operating such property, and it may do so without any finding that the means adopted are required to achieve the objectives of the Federal Power Act.

3. The court's decision is contrary to numerous decisions of this Court. This Court has repeatedly held that means chosen by administrative agencies to achieve lawful

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required operation by the Commission, rather than by Pacific. Since the Commission had made no such findings, it is obvious that the Court could not itself supply such findings. Burlington Truck Lines v. United States, 371 U.S. 156, 168-69 (1962); S.E.C. v. Chenery Corp., 318 U.S. 80, 87-8 (1943).

statutory objectives must be fully justified by findings and reasons. *Secretary of Agriculture v. United States*, 350 U.S. 162, 167 (1956); *S.E.C. v. Chenery Corp.*, 318 U.S. 80, 87-8 (1943); *Morgan v. United States*, 298 U.S. 468, 480 (1936). Ironically, the court below in this very case quoted from one such decision, *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 167 (1962), as follows:

> "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. See *Siegel Co. v. Federal Trade Comm'n*, 327 U.S. 608, 613-614. Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster, which rules with no practical limits on its discretion.' *New York v. United States*, 342 U.S. 882, 884 (dissenting opinion). 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.' *Federal Communications Comm'n v. RCA Communications, Inc.*, 346 U.S. 86, 90."

4. The court's decision is contrary to its own decision in this very case with respect to the egg collecting facility. Having found that the Department is obligated by contract to operate and maintain the *egg collecting facility*, the court held that the Commission might not "now transfer the burden to Pacific" unless "it found upon sufficient evidence that there are sound reasons to do so" (R. 518). At the same time, the court held that the Commission might require Pacific to reimburse the State for its cost of operation and maintenance of the *hatchery* without any finding or evidence that there are sound reasons for doing so. The

court thus condoned in the one case what it condemned as administrative arbitrariness in the other. In both cases the end sought by the Commission is lawful, but in neither case are the means reasonable, we submit, unless supported by administrative findings and reasons.

The Court Has Abridged Pacific's Rights Acquired by Its Settlement Agreement with the Department.

The court has misconstrued the settlement agreement between Pacific and the Department which relieves Pacific from all claims and demands and thus from any obligation to reimburse the Department for operation and maintenance costs. The court held instead that the agreement does not relieve Pacific from the obligation to pay for the operation and maintenance cost of the *hatchery*. According to the court, since the agreement does not require "that the Department, rather than Pacific, pay for operation and maintenance" (R. 517), the Department is free to claim perpetual reimbursement from Pacific. This makes a mockery of the Department's release of "all claims and demands" (R. 265). We had heretofore thought such language meant that nothing more could be claimed, other than that specifically promised by Pacific in the agreement. According to the court, the language means just the opposite: anything may be claimed which the Department did not by specific enumeration promise not to claim. This is a clearly erroneous interpretation.

Having itself thus abridged Pacific's contract in one respect, the court invited the Commission to do so in another. For the court held that the Department "impliedly agreed to pay for maintenance and operation" of the *egg collecting facility*. It then remanded to the Commision for it to determine whether "there is any evidence that would

support a finding of reasons to disregard the contract and thus relieve the state of its bargain" (R. 579).

We submit that neither the Court of Appeals nor the Commission is free to set aside Pacific's rights acquired by contract. So to do is an abridgment of Pacific's rights guaranteed by the Due Process Clause of the Fifth Amendment. *Lynch v. Griswold*, 292 U.S. 571, 599 (1934).

The Court Invaded the Administrative Discretion of the Commission.

Article 50 of the Commission's order requires Pacific, *inter alia*, to reimburse the California Department of Fish and Game "for 80 percent of the combined annual cost of operation and maintenance" of the fish hatchery at Iron Gate (R. 411). This plain and unambiguous language is first correctly construed by the court as follows (R. 521):

> "Rather than requiring Pacific to pay the full cost of operating and maintaining the hatchery at 80% of capacity, it requires that it pay 80% of the annual cost of operation and maintenance."

Inconsistently, the court then characterizes Article 50 of the license as being unclear in this respect. Plainly the license means precisely what the court, in the language just quoted says it means. However, the court does not accept its own correct interpretation of the clear language of Article 50. It proceeds to "presume that the Commission intends that, so long as the Department operates the hatchery at at least 80 percent of capacity, Pacific should pay for the cost of operating at 80 percent of capacity but that in no event should Pacific be required to pay more than actual operating costs". Accordingly, the court has remanded to the Commission "for such clarification of Article 50 as it may desire to make." (R. 521.)

The court says that the clear language of Article 50 "appears to be inconsistent with the views expressed by the Commission itself" (R. 521), but it does not indicate the nature of the asserted inconsistency. To be sure, the Commission asserted that it was "unable to order the State of California to assume the remaining 20 percent of operation and maintenance expenses", but it also stated its belief that this arrangement was reasonable "and will be so considered by the State agency" (R. 2537). The Commission thus intended that the Department would agree to pay 20 percent of the operation and maintenance cost as a condition to receiving the privilege of owning and operating the hatchery. Unless the entire hatchery is operated, the Commission's purpose in requiring its construction will be frustrated.

The court rejected all of the State's contentions that the Commission is legally obligated to impose all the cost of operation and maintenance upon Pacific. If the court does not agree with the Commission's policy, it may not substitute its policy for that of the Commission. *Phelps Dodge Co. v. N.L.R.B.*, 313 U.S. 177, 194 (1941). For it to invite the Commission to do so in the guise of correcting a nonexistent ambiguity violates the spirit of that stricture. The court's action constitutes a clear interference with administrative discretion.

The court's order of remand should be reversed in the interests of sound administration of justice.

CONCLUSION

For the reasons hereinabove stated, this cross-petition should be granted.

Respectfully submitted,

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Company

(Appendix follows)

Appendix A

United States Court of Appeals
for the Ninth Circuit

Pacific Power & Light Company, Department of Fish and Game of the State of California, *Petitioners,* vs. Federal Power Commission, *Respondent.*	Nos. 18,853 and 18,954

[June 8, 1964]

On Petitions to Review an Order of the
Federal Power Commission

OPINION

Before: POPE, MERRILL and DUNIWAY, Circuit Judges

DUNIWAY, Circuit Judge:

These are petitions, consolidated for hearing and determination, to review a decision of the Federal Power Commission. The order in question relates to the Iron Gate Dam on the Klamath River in Northern California, a facility constructed by petitioner Pacific Power & Light Company (Pacific) under a Commission license. Pacific attacks the portion of the order that requires it to construct, at its

expense, a fish hatchery, and to reimburse the Department of Fish and Game of the State of California (Department) for 80 percent of the cost of operating the hatchery and of operating fish egg taking facilities already constructed. The Department also attacks the order, urging that Pacific should be required to pay 100 percent of the cost of the operation of these facilities, with one exception.[1]

The Klamath River, which rises in Southern Oregon and flows into and across California to the Pacific Ocean, has long been a famous fishing stream, supporting large numbers of anadromous fish: king salmon, silver salmon and steelhead trout. Pacific's predecessor, the California Oregon Power Company (Copco), constructed five hydroelectric plants on the river and its tributaries, between 1908 and 1925. None was licensed by the Commission; three were constructed before the enactment of the Federal Water Power Act on June 10, 1920.

Two of the plants, Copco No. 1, built in 1918, and Copco No. 2, built in 1925, are located close together on the river and about 100 miles from the sea. Their construction cut off access to spawning areas above them, and Copco and the State of California therefore agreed that Copco should build a fish hatchery at Fall Creek, just below Copco No. 2, and an egg taking station. The hatchery was conveyed to

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1. The Department voluntarily consents to bear operation and maintenance costs of Iron Gate Fishery facilities that may be incurred for all king salmon egg taking at Iron Gate over 15,800,000 annually, and 19% of the quantity up to that figure. It asserts that it has not agreed to bear any costs with respect to species other than king salmon, or 81% of the king salmon eggs up to 15,800,000 annually.

The Department takes this distinction based upon its historical assumption of operation and maintenance costs of the now abandoned Fall Creek facilities and facilities substituted since its abandonment. However, this distinction becomes irrelevant in view of the conclusions we reach, *infra*.

the state, which operated it at its own expense, until 1948, when it was abandoned. Thereafter, eggs taken at the station were transported by the state to its Mt. Shasta hatchery.

Copco No. 1 and No. 2 have been operated as peak load facilities. Water was released downstream only when it was desired, because of demands on the Copco system, to add their power output. This has resulted in sudden and extreme fluctuations in the flow of the river, which in turn, has been detrimental to the fishery and hazardous to human life. While Copco claimed that its operation in this manner had continued so long that it had a prescriptive right to continue it, the state took a contrary position, and sought to prevent the operation as a public nuisance. In 1950 it filed suit for that purpose. (See *California Oregon Power Co. v. Superior Court*, 1955, 45 Cal.2d 858, 291 P.2d 455).

In 1951, Copco applied to the Commission for a license to construct another facility, called Big Bend No. 2. The Commission then issued an order requiring it to show cause why all of the existing facilities should not be brought under license. (See *California Oregon Power Co.*, 10 F.P.C. 1561) In 1954, the Commission held that all of the facilities were within its jurisdiction. (13 F.P.C., 1; 15 F.P.C. 14; *California Oregon Power Co. v. F.P.C.*, D.C. Cir., 1956, 239 F.2d 426) The 1954 order left open the question whether a license should require the installation of re-regulating facilities at Iron Gate.

In 1957, Copco asked for a license, Project No. 2082, for the existing facilities, and also for an amendment of the license to authorize the Iron Gate development, for two stated purposes, production of power and regulation of the flow of the river. Thereafter, in 1959, Copco and the state entered into an agreement which refers to the state's pending lawsuit and Copco's pending application for a license

for Iron Gate. It recites that Iron Gate will regulate the flow of the river in the manner desired by the state, and that the desire of the parties is to facilitate the issuance of the license. Copco agrees to proceed with the development as soon as licensed, and to release water from it in a manner specified. The agreement, paragraph 3, also provides: "Copco shall construct permanent fish trapping and egg collecting facilities at or near and downstream from the Iron Gate development, . . . and title thereto, . . . shall, upon completion of the facilities, be conveyed by Copco to the State;".

Copco received from the state a dismissal, with prejudice, of its lawsuit, and a release. It agreed, pending construction of Iron Gate, to "manually operate" Copco No. 1 and No. 2 so as to limit downstream fluctuations. The release is: ". . . from any and all claims, demands, actions and causes of action, for any and all legal and equitable relief arising at any time in the past, and for such reasonable future time as may be necessary for construction of the Iron Gate development referred to in said agreement by reason of alleged conduct of Copco of the kind described in the complaint in an action in the Superior Court of the State of California, in and for the County of Siskiyou, No. 13995." The agreement states, in reference to the release and dismissal: "The parties hereto understand and agree that the effect of said dismissal with prejudice and said release will be that no claim will ever be made against Copco in the future for damages or any other relief arising out of any act or omission of Copco, up to the date of this agreement so long hereafter as Copco shall perform its obligations under this agreement, of the kind embraced within the complaint in said state court suit; but that the prosecution of any action hereafter brought, claiming relief by reason of alleged

wrongful conduct of Copco occurring after the date of this agreement, shall not be prejudiced thereby." It also provides: "The State, the Department and the [California Fish and Game] Commission shall forthwith cause to be withdrawn and dismissed all protests and interventions with respect to the pending applications of Copco before the Federal Power Commission in Project No. 2082, and before the State Water Rights Board in Application No. 17,527; provided, that the right is reserved to all parties hereto to be heard in any future proceedings in regard to fishery facilities, other than the fish trapping, and egg collecting facilities referred to in paragraph 3 thereof." It does not state at whose expense the fish trapping and egg collecting facilities are to be operated. Pacific asserts that conveyance of title to the state means that the state is to operate them at its own expense, particularly because the reservation of the rights to be heard in future proceedings in regard to fishery facilities expressly excepts the fish trapping and egg collecting facilities.

Pursuant to the agreement, the state, the Department and the California Fish and Game Commission withdrew their protests and interventions in the Commission's Project No. 2082, and the Commission issued its license for Iron Gate in January, 1960. (23 F.P.C. 59; 25 F.P.C. 579). The order amends the license for Project No. 2082 to include the existing facilities, and to authorize Iron Gate, all as part of a single project. Article 30 contains the following reservations: "The Commission reserves the right to determine at a later date after notice and opportunity for hearing, the following matters . . . (b) Whether the Licensee for Project No. 2082 shall construct, operate and maintain a fish hatchery and appurtenant facilities.

Article 42 requires construction of the agreed-upon fish

trapping and egg collecting facilities. It is silent on the subject of their operation. Article 43, on the other hand, requires Copco to construct, maintain and operate fish ladders, fish traps, or other fish handling facilities or fish protective devices.

An amendment of March 27, 1961 adds Articles 49 and 50:

> "Article 49. The Licensee shall construct, maintain, and operate or shall arrange for the construction, maintenance, and operation of artificial propagation facilities and such other permanent fish facilities and protective devices including, but not limited to, fish-hauling trucks, fish screens or ladders, and comply with such reasonable modifications in project structures and operation in the interest of fish life as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing.
>
> "Article 50. The Licensee shall construct, concurrently with the construction of Iron Gate Dam, and thereafter operate and maintain permanent fish trapping, collecting, holding, and spawn-taking facilities and appurtenances at or near and downstream from Iron Gate Dam as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing."

Articles 42 and 43 were eliminated. The license, as so amended, was accepted by Copco.

In August, 1961, the Department petitioned, in Project No. 2082, pursuant to Article 49, for an order requiring Pacific to construct, operate, and maintain a hatchery adjacent to the egg collecting station. The petition does not ask that Pacific be required to pay the cost of operating the egg collecting station. Pacific denied that a hatchery was

necessary or appropriate, and the matter was heard on these pleadings. Pacific and the Department stipulated as to the size and type of hatchery that would be built, if the Commission should so order, but reserving Pacific's claims that a hatchery was not required and that, if required, Pacific should not pay for it or for its operation. The power of the Commission to require the construction and operation of fishery facilities, including a fish hatchery, rests on section 10(a) of the Federal Power Act, 16 U.S.C. §803(a), which provides that all licenses issued by the Commission shall contain conditions:

> "That *the project* * * * shall be such as in the judgment of the Commission will be best *adapted to a comprehensive plan for improving or developing a waterway or waterways* for the use or benefit of interstate or foreign commerce, for the improvement and utilization of water-power development, and *for other beneficial uses, including recreational purposes;* * * *" (Emphasis added)

The petitioners are agreed that the Commission is empowered by this subsection to require the construction and maintenance of a fish hatchery. The basic questions, then, are whether this is an appropriate case for the exercise of that power, and if so, whether the power has been properly exercised. Pacific also concedes that the question of whether a hatchery should be built was reserved, both in its agreement with the state and in the Commission's prior orders, and was properly before the Commission upon the Department's August, 1961 petition. Its contention is that the evidence does not sustain the determination that a hatchery was needed. We do not agree.

The evidence shows that one of the reasons for constructing the Iron Gate Dam was to regulate the flow of the stream, so as to eliminate the extreme fluctuations caused

by the method of operating Copco Nos. 1 and 2. It was Copco that chose to operate them that way. It could have abated the fluctuations by operating them in a different manner. It preferred the Iron Gate Dam because this would assure the continued operation of Copco Nos. 1 and 2 as peak load facilities, would create another source of power at Iron Gate Dam itself, and would eliminate the fluctuations as the state was seeking to require, both in its lawsuit and before the Commission. The fact that the state, which had been seeking to abate what it claimed to be the nuisance created by Pacific's method of operating its two facilities, decided to accept this method of abatement, does not make the choice that of the state rather than that of Pacific. At most it makes it the choice of both. When parties settle a controversy, the settlement is ordinarily not forced by one upon the other—usually it is a result somewhere between the desires of either.

The way in which these objectives were accomplished was by the building of a dam at Iron Gate, some 8 miles below Copco No. 2. This created a reservoir area some 8 miles long, into which flows the irregular discharges from the two Copco facilities, and in which they are held. The power plant and dam at Iron Gate are then so operated as to maintain a reasonably continuous discharge of water below Iron Gate. This does eliminate the fluctuations below Iron Gate, and does improve the fishery below Iron Gate.

There is, however, another result. The new reservoir, above Iron Gate, submerges some 16 miles (about 8 on the Klamath; about 8 on its tributaries) of the better fishing and spawning grounds on the river. It covers them with comparatively still water, and renders them unfit for spawning, and less desirable as habitat. The evidence supports, though it may not require, a finding that most fish headed

upstream and reaching the barrier of Iron Gate Dam will not turn back downstream to spawn, and that a substantial percentage (perhaps over 50%) of the fish moving upstream will be so affected. The fish could not testify. The Commission had to rely upon studies by, and the opinion testimony of, expert biologists. In the nature of things, precision in prediction was quite impossible. But as we read the record, we think that it fairly supports the Commission's conclusions that "without a hatchery there can be no assurance that the fishery resource will be preserved and maintained at a level approximately equal to that which existed prior to construction of the Iron Gate Development" and that "[s]ince Licensee has created the situation which necessitates the fish hatchery, it is no more than reasonable to require that it pay the cost of construction thereof."

We have no doubt that the Commission could require Pacific to construct the hatchery at its own expense. Pacific's operations, as a unit, substantially interfere with the natural ecology of the river and deleteriously affect one of its most valuable recreational features. It is quite proper that, as a condition to its having the privilege of so doing, Pacific should be required to pay for facilities that will, at least in part, prevent the impairment of the principal recreational feature of the stream.

The Commission's orders do not directly require that the hatchery be conveyed to the state, as the contract between Pacific (Copco) and the state requires that the egg taking facilities be conveyed. But this result is certainly implicit in the order, else why the requirement that Pacific reimburse the Department for 80 percent of the cost of its operation and maintenance? At oral argument, counsel for Pacific stated that it would prefer to own and operate the hatchery itself. This, however, seems to be an afterthought.

We cannot find in the record any indication that it seriously urged this contention before the Commission. There, its position has been (a) that no hatchery is needed, (b) that if one is needed, Pacific should not be required either to build it or pay for it, and (c) that in any event it should not be required to pay for maintenance and operation. It does not now urge that the state is not able or willing to operate the hatchery properly.

Assuming that the contention is available to Pacific, we cannot say that it is improper for the Commission to require conveyance of the hatchery to the state. The state and federal governments are not such separate entities, either legally or in fact, that one cannot call upon the other to help to achieve, in the public interest, a result that they both desire. The objective that the Commission seeks here is one that Congress has authorized it to seek. The choice of means, so long as they are reasonably adapted to achieve the authorized end, is not for Pacific, but for the Commission. There is no doubt, upon this record, as to the competence of the state to operate the hatchery, or its willingness to do so. If there be evidence in the record that Pacific is equally able and willing, it has not been called to our attention.

There remain the questions of the expense of maintenance and operation (1) of the hatchery and (2) of the egg taking facilities. As to the hatchery, we think that what we have already said disposes of the question. If the Commission could have required Pacific to build and itself to maintain and operate, and if, as we have held, it could require conveyance of the hatchery to the state, it can also require that the state be reimbursed for the expense of maintenance and operation. Unless the hatchery is maintained and operated, its construction means nothing, and the desired end, preservation of the fishery, will not be achieved.

Pacific's reply is, first that the Commission is meddling in matters that are beyond the scope of the Federal Power Act, and is acting in contravention of state laws. It says that, if no funds were provided by it, the Department would still be required by state law to operate the hatchery at its expense, and that therefore the Commission's order improperly interferes with the fiscal affairs of the state, and unlawfully imposes upon Pacific a burden that, under state law, Pacific is entitled to have the state bear. It says, second, that its settlement agreement with the state gives it a contract right to have the state maintain and operate the hatchery.

In support of its first argument, Pacific cites Section 5938 of the California Fish and Game Code. That section provides:

> "Whenever in the opinion of the [California Fish and Game] commission it is impractical, because of the height of any dam, or other conditions, to construct a fishway over or around the dam, *the* [*California Fish and Game*] *commission may*, in lieu of the fishway, *order the owner of the dam completely to equip*, within a specified time, on a site to be selected by the department, *a hatchery*, together with dwellings for help, traps for the taking of fish, and all other equipment necessary to operate a hatchery station, according to plans and specifications furnished by the department. *After such hatchery has been constructed*, the department shall operate *it* without further expense to the owner of the dam except as provided in sections 5940 and 5941." (Emphasis and bracketed words added.)

It was first enacted in 1917 (Cal. Stats. 1917, ch. 749, § 1), before the Federal Water Power Act, and on its face deals only with hatcheries ordered constructed by the state. It does not purport to deal with federally licensed projects. Here, it is the Commission, not the state, that ordered the

hatchery constructed. The Department's request that the Commission do so does not make the order the state's order. Indeed, we think it doubtful that the state could have ordered this federal licensee to construct a hatchery at this federally licensed facility. We think there is nothing in Pacific's first contention. Nor is there anything in Pacific's argument that the Department has no authority to receive or use the funds required to be paid to it. We doubt if Pacific has any standing to raise the question. Section 13,011 of the California Fish and Game Code does not support Pacific's arguments.

The short answer to Pacific's second contention is that there is nothing in the agreement with the Department, or the release, that requires that the Department, rather than Pacific, pay for the operation or maintenance of the hatchery. On the other hand, Article 49 of Pacific's license does require Pacific to "construct, maintain and operate, or . . . arrange for the construction, maintenance and operation of artificial propagation facilities . . . as may be prescribed hereafter by the Commission. . . ."

The egg taking facilities present a different question. They were provided for in Pacific's agreement with the Department, had been constructed and conveyed to the Department, and were being operated by the Department, when the order under review was made. We assume that Article 50 reserves the question as to who shall pay for operation and maintenance, as the Department claims.[2]

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2. We are not, however, convinced that it does. Article 50 refers to facilities of this kind that "may be prescribed hereafter . . . after notice and hearing." Hereafter must mean after March 27, 1961, when Article 50 was added to the license. The Commission had previously, in Article 42, of January 13, 1960, ordered Pacific to construct the agreed facilities. They were completed and tendered to the state by February of 1962. How, then, can Article 50 refer to them? On its face, it appears to refer to possible different or additional facilities.

But we are of the opinion that the contract, although it does not specifically refer to maintenance and operation, contemplates maintenance and operation by the Department, and that the reservation in the contract relating to fishery facilities, which specifically excepts these facilities from its terms, does not reserve to the Department the right to demand that maintenance and operation be paid for by Pacific. The Department made a post hoc attempt to keep the question open by accepting the conveyance of the facilities, as agreed, but seeking to reserve the question unilaterally. This, however, cannot change the effect of the agreement, although the Commission seems to rely rather heavily upon it. We do not think that Article 50 is a valid contrary determination by the Commission. Nor does the original reservation in Article 30 of the license for Iron Gate reserve this question. The Department's petition did not ask for this relief specifically.

It may well be that none of these facts, as a matter of law, prevents the Commission from requiring Pacific to pay for the maintenance and operation of these facilities.[3] But the existence of power in the Commission does not dispose of the problem. The state arrived at a settlement with Pacific, under which these facilities were constructed and conveyed by Pacific to it. The Commission, to that extent, saw to it that the state got this benefit of its bargain. The state reserved no right to make further demands in this connection. We hold that it impliedly agreed to pay for maintenance and operation. This, together with the Commission's orders relating to the hatchery, appears to us,

3. The Commission says that it is not bound by any agreement between Pacific and the Department, citing *F.P.C. v. Oregon*, 349 U.S. 435; *First Iowa Hydro-Electric Coop. v. F.P.C.*, 328 U.S. 152, and other cases. This, however, does not mean that the Commission can arbitrarily disregard the contract.

absent other facts, to assure the desired preservation of the fishery. The Commission gives us no reason in public policy why the Commission should now transfer the burden to Pacific and relieve the state from its bargain. We think that it would be justified in so doing only if it found upon sufficient evidence that there are sound reasons to do so. It made no such finding or determination. So far as its findings and opinion reveal, it based its decision entirely upon what we hold to be its erroneous legal conclusions, either (a) that the state had not agreed to pay the cost of operation and maintenance, or (b) that the state could unilaterally relieve itself of its obligations, or (c) that Article 50 had the effect of relieving the state of its obligations.

The Commission now asserts in its brief that it is not bound by the contract, assuming that it means what Pacific says that it does and what we hold that it does. We quite agree that this is not a private lawsuit between Pacific and the Department. We also agree that the Commission is not "bound" by the contract. We do not, however, think that this alone is a reason for disregarding the contract[4] As the Supreme Court has said in *Burlington Truck Lines, Inc. v. United States*, 1962, 371 U.S. 156, 167:

> "There are no findings and no analysis here to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. See *Siegel Co. v. Federal Trade Comm'n*, 327 U.S. 608, 613-

4. The Federal Power Act, § 313(b) (16 U.S.C. § 8251(b)) declares that this court, on review of an order of the Commission, has jurisdiction "to affirm, modify or set aside such order [of the Commission] in whole or in part." The Administrative Procedure Act, § 10(e) (5 U.S.C. § 1009(e)) directs that this court shall "hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."

> 614. Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster, which rules with no practical limits on its discretion.' *New York v. United States*, 342 U.S. 882, 884 (dissenting opinion). 'Congress did not purport to transfer its legislative power to the unbounded discretion of the regulatory body.' *Federal Communications Comm'n v. RCA Communications, Inc.*, 346 U.S. 86, 90."

The Commission does not act in a vacuum, and we think it just as much bound to take into account a contract of this kind, which, if carried out, would assist in accomplishing the result that the Commission desires, as it is to take into account the topography of the Klamath River Basin and the biological functioning of anadromous fish. Surely, it would be arbitrary if the Commission had concluded, in the face of the evidence, that the fish would spawn successfully in the reservoir formed by the Iron Gate Dam, when all of the evidence is that they would not. So here we think it arbitrary for the Commission to disregard the contract for no apparent reason. It has not found, and it makes no attempt to point to any evidence that would support a finding of reasons to disregard the contract and thus relieve the state of its bargain.

There remains the Department's contention that the Commission could not require that it pay 20 percent of the cost of maintenance and operation of the hatchery. The Commission did not so order. It merely ordered that Pacific pay 80 percent. The Department asserts that section 10(a) of the Act, quoted *supra*, requires that the Commission impose the entire cost upon Pacific. The section certainly does not do so expressly. It merely requires conditions in the license that, "in the judgment of the Commission," will be best adapted,

inter alia, "for other beneficial uses, including recreational purposes." We think that this gives the Commission wide latitude, and that its judgment should not be disturbed unless exercised in an arbitrary manner.

Here the Commission determined that "[t]he evidence in the record *suggests* that the regulation of the flow of the Klamath River by the Iron Gate Dam combined with the construction and operation of the hatchery will result in a greater fish population than if Iron Gate had not been built. This would stem from the reduction or elimination of destruction of natural fluctuation and river levels which will follow from the construction of Iron Gate Dam and its operation in accordance with the year-round minimum releases required by Article 52 of the license. To impose on the Licensee the full costs of building and operating the hatchery would not merely restore the status quo, but would actually require Licensee to pay for enhancing the fish production as compared with pre-Iron Gate conditions. Apportioning 20 percent of the operating costs to the Department will *more nearly* result in restoring the status quo." (Our emphasis)

The Department attacks this statement as inconsistent with the formal findings that the hatchery is needed to compensate for the loss of spawning grounds above Iron Gate, and is necessary to sustain the fishery at a level "*approximately equal*" to that which existed before the construction of Iron Gate. In this, the Department is perhaps technically correct. We do not think, however, that the matter should be treated with such iron rigidity. As we have pointed out, the Commission was here dealing with predictions. The evidence does indeed "suggest" what the Commission says it does. Even the finding on which the Department relies deals only with conditions "approximately equal" to pre-Iron

Gate conditions. We do not think that the Commission's conclusion is unreasonable. We need not consider the other bases for its order that are stated in the Commission's opinion. We neither approve nor disapprove them.

We do not think, however, that Article 50 of the license is unclear in one respect. Rather than requiring Pacific to pay the full cost of operating and maintaining the hatchery at 80 percent of capacity, it requires that it pay 80 percent of the annual cost of operation and maintenance. Thus, if the Department chose to reject the benefit of full capacity operation (a benefit that the Commission does not claim that it can order the Department to accept) and operates at 80 percent, Pacific would pay only 80 percent of 80 percent. This appears to be inconsistent with the views expressed by the Commission itself. We presume that the Commission intends that, so long as the Department operates the hatchery at at least 80 percent of capacity, Pacific should pay for the cost of operating at 80 percent of capacity, but that in no event should Pacific be required to pay more than actual operating costs.

It may be that there is evidence now in the record, or that other evidence can be produced, that would justify the decision of the Commission as to the operation and maintenance of the fish trapping and egg taking facilities. That is a question for the Commission, not for us. (*Burlington Truck Lines v. United States, supra; F.P.C. v. Idaho Power Co.*, 1952, 344 U.S. 17, 20-1)

The matter is remanded to the Commission for further proceedings, not inconsistent with this opinion, relating to the cost of operating and maintaining the fish trapping and egg taking facilities, and for such clarification of Article 50 as it may desire to make. In all other respects, the orders of the Commission are affirmed.

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IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1964

No. 648

DEPARTMENT OF FISH AND GAME OF THE STATE OF CALIFORNIA, *Petitioner*,

v.

FEDERAL POWER COMMISSION; PACIFIC POWER & LIGHT CO., *Respondents.*

BRIEF AMICUS CURIAE ON BEHALF OF THE STATE OF WASHINGTON URGING GRANTING OF PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

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BRIEF AMICUS CURIAE ON BEHALF OF THE STATE OF WASHINGTON URGING GRANTING OF PETITIONER'S APPLICATION FOR A WRIT OF CERTIORARI

STATEMENT OF INTEREST

The State of Washington through its Department of Fisheries, Department of Game and Parks and Recreation Commission, being represented by its Attorney General, pursuant to Rule 42 (4), Revised Rules of the Supreme Court of the United States, urges the granting of petitioner's application for a writ of certiorari to review the decree of the United

States Court of Appeals for the Ninth Circuit in its opinion for the above-entitled case reported at 333 F. 2d 689 (June 8, 1964).

The Department of Fisheries is organized under Title 75 of the Revised Code of Washington (hereinafter referred to as RCW) and has the duty to propagate, protect, preserve, conserve and manage all food fish and shellfish of the state (RCW 75.08.020). The Department of Game is organized pursuant to Title 77 of RCW and has the duty to preserve, protect and perpetuate all game fish, animals and birds in the state (RCW 77.12.010). The Parks and Recreation Commission is organized pursuant to RCW 43.51 *et seq.* and has the duty to acquire, develop, operate and maintain parks, parkways and other recreational areas in the state (RCW 43.51.040; .050; .060).

The State of Washington, next only to Alaska, supports the largest anadromous fishery resource in the United States. It produces more hydroelectric energy than any state in the Union. Washington has long been concerned with the impact of hydroelectric projects on the anadromous fishery resources. A major portion of this state's economic structure is built around commercial and sport fishing for anadromous fish.[1]

Presently there are at least nine hydroelectric project license applications pending before the Federal Power Commission or the courts that have a

[1]Seventy-Second Annual Report, Washington Department of Fisheries, 1962, pages 125-211.

direct and substantial impact on Washington's anadromous fishery resources.[2] The operation and maintenance costs for anadromous fishery facilities for these various projects annually amount to hundreds of thousands of dollars and are totally borne by the respective licensees. Additionally hydroelectric projects ofttimes result in the elimination of existing, planned or future park sites[3] and game animal and bird rearing and habitat areas. Natural spawning areas for both salmon and steelhead are also inundated by projects of this nature.[4]

QUESTIONS PRESENTED

The State of Washington concurs in petitioner's delineation of the issues tendered by this petition for a writ of certiorari. In addition, we would offer the following question of general application presented by this controversy:

May the Federal Power Commission, having already determined pursuant to section 10(a) of the Federal Power Act[5] "a comprehensive plan for improving or developing a waterway * * * for the use and benefit of interstate or foreign commerce * * * and for other beneficial recreational uses, including recreational purposes," impose upon the

[2]Federal Power Commission Project Docket, Numbers 1971, 2062, 2241, 2243, 2273, 2316, 2324, 2342 and 2369.

[3]There are 103 state parks and 125 other recreational areas in Washington. *Washington Outdoor Recreation Guide*, Department of Commerce and Economic Development of Washington, 1964.

[4]For example, the Columbia River originally contained 1,500 miles of spawning areas, but hydroelectric projects have reduced this to 63 miles.

[5]41 Stat. 1068 (1920), as amended, 16 U.S.C. § 803(a) (1958 supp.).

licensee less than the total cost of developing such plan for the term of the project, thereby forcing the state to assume the difference between the licensee's contribution and the total project cost?

ARGUMENT

The State of Washington submits that there is a present need for judicial review of the Commission's decision in this case and, more importantly, for an interpretation of the Commission's statutory authority under section 10(a) of the Federal Power Act. The interpretation rendered by the Commission and the Ninth Circuit Court of Appeals will impose financial burdens upon every affected state and local governmental agency whenever the decision below is followed in allocating the cost of comprehensive plans of development. Neither California, Washington, nor any other state should be obligated to appropriate moneys for the fulfillment of a comprehensive plan which may or may not be a part of the overall planning programs of the affected state agencies which are operating within a well recognized area of state police power activity. *Geer v. Connecticut*, 161 U. S. 519 (1896). Should the California legislature fail to appropriate the necessary moneys to pay the operating and maintenance costs of the sort presented in the instant case, the "comprehensive plan" adopted by the commission pursuant to section 10(a) could never be realized. Congress could not have intended such a result.

CONCLUSION

For the foregoing reasons, the State of Washington respectfully urges the court to grant petitioner's application for a writ of certiorari.

Date: November 20, 1964.

Respectfully Submitted,

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MIKE JOHNSTON
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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 648

DEPARTMENT OF FISH AND GAME OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

FEDERAL POWER COMMISSION; PACIFIC POWER & LIGHT CO.,

Respondents.

MEMORANDUM FOR THE STATE OF OREGON AS AMICUS CURIAE

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No. 648

DEPARTMENT OF FISH AND GAME OF THE STATE OF CALIFORNIA,
Petitioner,
FEDERAL POWER COMMISSION; PACIFIC LIGHT & LIGHT CO.,
Respondents.

MEMORANDUM FOR THE STATE OF OREGON AS AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The State of Oregon has in existence, under construction and in the planning stage, many hydroelectric projects both on and within its borders. The principal rivers involved are the Columbia, Snake, Willamette, Rogue and Deschutes Rivers and their tributaries.

All of these rivers and a large number of less important rivers with hydroelectric projects on them support substantial populations of anadromous and resident food and game fish. These fish support a vital segment of the State's economy not only from the aspect of the com-

mercial fishing industry but as an important adjunct to the third largest industry in the State, tourism.

All of the hydroelectric projects on these rivers require some sort of fish protective facilities from ladders to hatcheries to mitigate the damage caused by the projects to the fishery resource. Therefore, any decision of the courts involving such fish protective facilities, particularly the decision in *Pacific Power & Light Co., et al. v. Federal Power Commission*, 333 Fed.2d 689, is of utmost interest to the people of the State of Oregon.

ARGUMENT

The State of Oregon takes the position that the action of the Federal Power Commission in apportioning the costs of operation and maintenance of the fish hatchery at the Iron Gate project, 80 percent to the licensee and 20 percent to the California Department of Fish and Game, is without statutory authority. If the decision of the Court of Appeals for the Ninth Circuit is allowed to stand, a dangerous precedent will be established which will, in effect, allow the Federal Power Commission to order the State governments to subsidize federally licensed hydroelectric projects. This is not the intent of Congress, but this is in actuality what is taking place when the obscuring veil of sophistry is lifted.

The court said the Commission did not order the California Department of Fish and Game to pay 20 percent of cost of operation and maintenance of the hatchery, (page 17A, petitioner's brief) but in the very next para-

graph quotes the determination of the Commission as saying "To impose on the Licensee the full costs of building and operating the hatchery would not merely restore the status quo, but would actually require Licensee to pay for enhancing the fish production as compared with pre-Iron Gate conditions." *Apportioning 20 percent of the operating costs to the Department will more nearly result in restoring the status quo.*" (emphasis supplied)

On page 35A of the brief of Department of Fish and Game, we find the following language in the Opinion of the Federal Power Commission: "Although we are unable to order the State of California to assume the remaining 20 percent of the operation and maintenance expenses, we believe that the apportionment of costs as herein set out is reasonable and will be so considered by the State agency. Apportionment of the costs in this manner also will provide the State with a financial incentive to assure economy of operation of the fishery facilities."

It appears to the State of Oregon that what the Commission says it cannot do it goes right ahead and does.

Oregon contends that any facilities to pass fish, or those substituted for passage (i.e. hatcheries) come under not only Section 10(a) of the Federal Power Act, but under Section 18 of the Act where Congress provided specifically that "The Commission shall require the construction, maintenance, and operation by a licensee *at its own expense* of such lights and signals as may be directed by the Secretary of the Department in which

the Coast Guard is operating *and such fishways* as may be prescribed by the Secretary of Commerce. (emphasis supplied)

CONCLUSION

Wherefore the State of Oregon, as *amicus curiae*, in the firm belief that Congress intended that licensees under the Federal Power Act should construct fish facilities at their own expense as set forth in Section 18 of the Act, respectfully requests that the Writ of Certorari petitioned for by the Department of Fish and Game of the State of California be granted.

ROBERT Y. THORNTON

Attorney General for the
State of Oregon

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In the Supreme Court of the United States

OCTOBER TERM, 1964

DEPARTMENT OF FISH AND GAME OF THE STATE OF CALIFORNIA,

Petitioners,

v.

FEDERAL POWER COMMISSION; PACIFIC POWER AND LIGHT COMPANY,

Respondents.

STATEMENT AMICUS CURIAE SUBMITTED BY THE STATE OF LOUISIANA IN SUPPORT OF THE GRANTING OF THE REQUESTED WRIT OF CERTIORARI

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

No. 512

In the Supreme Court of the United States

OCTOBER TERM, 1964

DEPARTMENT OF FISH AND GAME OF THE STATE OF CALIFORNIA,

Petitioners,

v.

FEDERAL POWER COMMISSION; PACIFIC POWER AND LIGHT COMPANY,

Respondents.

STATEMENT AMICUS CURIAE SUBMITTED BY THE STATE OF LOUISIANA IN SUPPORT OF THE GRANTING OF THE REQUESTED WRIT OF CERTIORARI

STATEMENT

The State of Louisiana, by its undersigned Attorney General, appears herein amicus pursuant to Rule 42(4) to support the granting of the requested writ of certiorari herein upon the ground that a determination by this Court on the merits of the issue involved will be of importance in the future administration of any programs it may have.

The State of Louisiana does not have any problems identical or similar to the one presented in this case; however, the State of Louisiana believes and therefore

asserts that it would be harmful to the State of Louisiana and the Louisiana Wildlife and Fisheries Commission to so broaden the power of the Federal Power Commission so as, in effect, to grant to the Federal Power Commission the power to impose on any state any portion of the burden of operating and maintaining facilities which the Commission has caused its licensee to construct as part of a plan to utilize and develop waterways.

THE DECISION BELOW IS IN ERROR BECAUSE:

(1) The Federal Power Commission has no authority under the statutory provision involved in this case (16 U.S.C. Sec. 803 (a)) to apportion costs or expenses between a state department and a federal power commission's private licensee.

(2) The requirement that the state bear any part of operation and maintenance cost of a project under license to a private organization or association issued by the federal power commission broadens the federal power act and reads into it matters that are not therein contained.

(3) Once the Federal Power Commission determines that a proposed plan for use of a particular waterway must include construction of recreational facilities, it necessarily follows that the commission must also provide for the operation and maintenance of the facilities by its licensee; otherwise, there is no guarantee that the overall plan will be successfully implemented as contemplated by the statute.

CONCLUSION

The Petition for a writ of certiorari should be granted because the Court of Appeals for the 9th Circuit has decided erroneously an important issue concerning the application of Section 10(a) of the Federal Power Act with reference to important recreational resources within the states of the Union. This issue has not been heretofore decided and it should now be resolved by the Supreme Court.

Respectfully submitted,

JACK P. F. GREMILLION,
Attorney General,
State of Louisiana.

Baton Rouge, Louisiana,
December 21, 1964.

CERTIFICATE OF COUNSEL

I, Jack P. F. Gremillion, a member of the Bar of the United States Supreme Court, and Attorney General for the State of Louisiana, do hereby certify that I have, on this the_____day of December, 1964, placed conforming printed copies of the foregoing amicus curiae statement in support of the granting of the requested Writ of Certiorari in the United States Mail, with sufficient first class postage prepaid, addressed to: Phleger & Harrison, Counsel for Pacific Power & Light Company; Richard A. Solomon, Counsel for Federal Power Commission; and the Honorable Archibald Cox, Counsel for Federal Power Commission.

Baton Rouge, Louisiana, this 2nd day of December, 1964.

Jack P. F. Gremillion

JACK P. F. GREMILLION,
Attorney General.

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In the Supreme Court of the United States

OCTOBER TERM, 1964

No. 648

DEPARTMENT OF FISH AND GAME OF THE STATE OF CALIFORNIA, PETITIONER

v.

FEDERAL POWER COMMISSION

No. 659

PACIFIC POWER & LIGHT COMPANY, PETITIONER

v.

FEDERAL POWER COMMISSION

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL POWER COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (R. 508, Dept. Pet. App. pp. 2A–20A) is reported at 333 F. 2d 689. The order (Opinion 381) of the Federal Power Commission (R. 397, *id.* pp. 21A–38A) is reported at 29 FPC 478, and its order on rehearing (Opinion 381A, R. 436, *id.* pp. 54A–80A) at 30 FPC 499. The Commission Examiner's initial de-

cision (R. 381, *id.* pp. 39A–53A) is reported at 30 FPC 499.

JURISDICTION

The decree of the court of appeals was filed on June 8, 1964 (R. 522). Timely petitions for rehearing filed by the Department of Fish and Game of the State of California and Pacific Power & Light Company were denied August 6, 1964 (R. 523). On October 26, 1964, Mr. Justice Douglas extended Pacific's time to file a petition for certiorari to and including November 9, 1964. Petitions for writs of certiorari were filed on November 2, 1964, and November 7, 1964, by the Department and Pacific, respectively. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b).

QUESTIONS PRESENTED

The Federal Power Commission issued an order requiring Pacific, a hydro-electric licensee, to construct certain fishery facilities to be operated by the California Department of Fish and Wildlife and to reimburse the State for 80% of the costs of operating those facilities. The court of appeals generally affirmed the order, but remanded the case to the Commission to resolve an ambiguity in the reimbursment requirement and to consider what weight should be given to an agreement between Pacific and the Department settling litigation brought by the Department concerning Pa-

cific's operation of its project. The Department contends (a) that the court misconstrued the terms of the agreement and (b) that the Commission is required by the Federal Power Act to impose upon the licensee 100% of the costs of maintaining the fishery facilities, rather than merely 80%. Pacific has filed a conditional cross-petition urging (a) that the Department's contentions are not ripe for review and (b) that the Commission erred in imposing any reimbursement obligation upon Pacific.

In our view the basic question presented is:

Whether, in view of the court's remand, the issues raised by the Department are premature.

If, contrary to our view, the above question were answered in the negative, the following questions would be presented:

1. Whether, under the Federal Power Act, the Commission must require every hydro-electric licensee to construct all facilities for desirable development of the waterway and to defray all continuing costs of their operation and maintenance, regardless of the circumstances and equities of the particular case.

2. Whether the court misconstrued the settlement agreement between Pacific and the Department.

3. Whether the Commission's imposition of reimbursement obligations upon Pacific was warranted.

4. Whether the court erred in concluding that the Commission's reimbursement requirement was ambiguous and should be clarified upon remand.

STATEMENT

In 1954, after a history of administrative proceedings, the Commission ruled that seven plants maintained by Pacific Power and Light Company (Pacific)[1] on the Link and Klamath Rivers in Oregon and Califronia constituted a hydro-electric project for which an F.P.C. license was required. *California Oregon Power Co.*, Project No. 2082, Opinions Nos. 266 and 266–A, 13 FPC 1 and 15 FPC 14. Pacific conceded the Commission's licensing jurisdiction on the grounds that the project was located on navigable waters of the United States and occupied federal government land.[2]

Among the plants comprising the project were two dams, Copco No. 1 and Copco No. 2, constructed in 1918 and 1925 on the Klamath River, which is a major area for sports fishing for anadromous fish. Pacific's operation of these developments as peaking plants resulted in sudden and extreme fluctuations of the river downstream, from no flow at all to unusually high flow, with resultant danger to human life and serious detriment to the anadromous fish, many of which

[1] Although Pacific did not acquire this project until 1961, the succession of title is not relevant to the issues raised here. Accordingly, we shall use "Pacific" to include its predecessors in interest.

[2] The Court of Appeals for the District of Columbia dismissed for lack of aggrievement Pacific's petition to review the Commission's additional ruling that it had jurisdiction because the project used surplus water from a government dam. *California Oregon Power Co.* v. *Federal Power Commission*, 239 F. 2d 426.

became stranded and died in the periods when the Copco plants were not generating.

Pacific could rectify this condition in one of two ways: (1) by ceasing to operate the Copco plants for peaking purposes; or (2) by constructing a re-regulating dam downstream. Pacific chose the latter alternative and applied to the Commission for a license authorizing construction of the Iron Gate development, which would serve to re-regulate the flow of the river and also generate electric energy. This method of correcting the situation was satisfactory to the California Department of Fish and Game ("the Department"); and, on the basis of the proposed development, litigation instituted by the Department against Pacific in the State courts was settled in 1959.

While it satisfactorily smoothed out the fluctuations of the Klamath River, the Iron Gate dam necessarily eliminated some 16 miles of anadromous fish spawning grounds on the Klamath River upstream to Copco No. 2, and on its tributaries in that stretch. Accordingly, when the Commission issued a license for Iron Gate, it included conditions under which facilities for fish protecton would be provided. As finally issued and amended, the license contained two articles concerning fish facilities: Article 49, relating to hatcheries, and Article 50, dealing with trapping, egg collecting and related facilities (herein referred

to as egg-taking facilities). These articles read as follows (R. 401):

> *Article 49.* The Licensee shall construct, maintain, and operate or shall arrange for the construction, maintenance, and operation of artificial propagation facilities and such other permanent fish facilities and protective devices including, but not limited to, fish-hauling trucks, fish screens or ladders, and comply with such reasonable modifications in project structures and operation in the interest of fish life as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing.
>
> *Article 50.* The Licensee shall construct, concurrently with the construction of Iron Gate Dam, and thereafter operate and maintain permanent fish trapping, collecting, holding, and spawn-taking facilities and appurtenances at or near and downstream from Iron Gate Dam as may be prescribed hereafter by the Commission upon the recommendation of the Secretary of the Interior and the California Department of Fish and Game, after notice and opportunity for hearing.

Pacific built the Article 50 egg-taking facilities as part of the original construction of the Iron Gate development, and they were put into operation by the Department in January, 1962 (R. 384).

In August, 1961, the Department petitioned the Commission for an order implementing Article 49. After hearing, the Commission ordered Pacific to construct hatchery facilities in accordance with plans

which all parties had stipulated to be appropriate if any hatchery facilities were required (R. 411, 378–380). In addition, it required that Pacific reimburse the Department for 80% of the costs of operating the hatchery and also the egg-taking facilities already constructed (R. 411–412).

Pacific and the Department each petitioned for review; Pacific challenged the requirement that it build a hatchery and reimburse the Department for 80% of operating costs, while the Department claimed that it was entitled to reimbursement for 100%, rather than merely 80%, of those costs. The Ninth Circuit sustained the requirements that Pacific build a hatchery and defray 80% of the costs of its operation. It ruled, however, that the Commission had not made clear whether Pacific was to reimburse the Department (1) for all such costs up to 80% of the costs for operation at full capacity, or (2) for 80% of the Department's actual costs if it operated at less than full capacity. Although the court "presumed" that the Commission intended alternative (1), it left the Commission free, on remand, to provide "such clarification * * * as it may desire." Dept. Pet. App. pp. 17A–20A.

With respect to the costs of maintaining and operating the egg-taking facilities, the court held that the agreement by which the Department and Pacific settled their State court litigation relieved Pacific of the obligation to make any reimbursement, and that the Commission, while not bound by the contract, could disregard it and impose such an obligation "only if it found upon sufficient evidence that there are sound

reasons for doing so" (Dept. Pet. App. pp. 15A–16A). The court remanded the case for further findings, with or without additional evidence, on that issue (Dept. Pet. App. p. 19A).

ARGUMENT

1. The Department's principal contention is that the court below erred in holding that the Commission was not required by the Federal Power Act to impose upon Pacific the entire cost of operating and maintaining the fishery facilities, rather than merely 80% of those expenses. It further suggests that the court misconstrued the settlement agreement between Pacific and the Department when it concluded that the agreement obligated the State to bear the operating costs of the egg-taking facilities (Dept. Pet. pp. 4, 21). In its "conditional cross-petition," Pacific has pointed out (Pac. Pet. p. 7) that these issues "will not be finally determined until further deliberations have been had by the Commission." We agree.

In the remand proceedings ordered by the court below, the Commission may conclude that there are sound reasons for requiring Pacific to bear the expenses of the egg-taking facilities notwithstanding its settlement agreement with the State. In that event, the court's interpretation of the agreement would cease to be an issue.[3] Moreover, the question of the Commission's discretion to burden Pacific with something less than the entire costs of operating and main-

[3] The Commission itself did not undertake to construe that agreement, holding that the agreement was not decisive as to obligations defined by Commission order under the Federal Power Act.

taining the fishery facilities cannot meaningfully be reviewed until the ambiguity in the Commission's order noted by the court below (*supra*, p. 7), has been resolved by a clarifying order. We submit, therefore, that neither of the issues tendered by the Department is presently ripe for consideration by this Court.

2. In any event, the present case involves a unique factual situation and neither the Commission's order nor the court's decision was based on any principle of general applicability. The court was clearly correct in rejecting the proposition that the Commission must require every power licensee to construct all facilities for desirable development of the waterway and to defray all continuing costs of operation and maintenance, regardless of the circumstances and equities of the particular case. Such a view, carried to its logical conclusion, would mean that an application for an FPC license must be denied unless the applicant is willing to construct and maintain flood control, navigation, recreation and/or other facilities, even if the costs involved might exceed by many times the advantages of the power project. Adoption of the Department's all-or-nothing approach would frustrate any private development whatsoever in circumstances where a potential power development could not economically support all facilities necessary for optimum development of the waterway. Congress intended no such self-defeating result when, in Section 10(a) of the Act, it provided for licensing of power projects "best adapted to a comprehensive plan

for improving or developing a waterway or waterways."

Given, therefore, that the Commission has wide discretion to determine the means for achieving optimum development in light of the factual situation, the only remaining question is whether that discretion was abused here. Plainly it was not. As the recipient of a valuable privilege to use public lands and waters for private gain, Pacific was obligated to preserve the public's natural resources; and indeed one of the principal purposes of the Iron Gate development was to smooth out the fluctuations in the Klamath River, destructive of fish life, which had been caused by Pacific's Copco developments. The Commission noted, however, and the court below agreed (Dept. Pet. App. pp. 18A–19A), that the evidence suggested that, in addition to eliminating the fluctuations produced by the Copco developments, the Iron Gate facilities will also eliminate natural fluctuations and thereby make the river somewhat more congenial to fish life than it would be in its natural state. In these circumstances, the Commission was not unreasonable in concluding that Pacific need not be required to bear all the costs of operating and maintaining the facilities.

Moreover, in view of the fact that the State was permitted to operate the facilities constructed by Pacific and thereby to maintain its traditional control

over the fish life of the river,[4] that the State had historically operated and maintained fish facilities at its own expense (R. 389) and was willing to assume a portion of the maintenance expenses involved here (Dept. Pet. p. 11, fn. 7), and that the State is no less vitally interested than the federal government in the preservation of these recreational resources,[5] it cannot be said that the Commission was arbitrary in limiting Pacific's obligation to 80%.

It should be noted, finally, that if the State assumes 20% of the expense of maintaining and operating the fish facilities, the cost to it will be no more than approximately $10,000 a year (R. 402). Thus, the Department does not, and could not reasonably, contend that this case is in itself of major economic significance.

3. Since Pacific seeks review only on condition that the Department's petition is granted, we shall comment only briefly on its contentions.

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[4] In answer to inquiries by the court at the oral argument below, counsel for the Department stated unequivocally that the State would not want operation of the fishery facilities turned over to Pacific or to a federal agency, such as the Fish and Wildlife Service of the Department of the Interior. With some justification, one of the judges of the court below suggested that in objecting to the Commission's order the State might well be "looking a gift horse in the mouth."

[5] As the court below said (Dept. Pet. App. p. 11A): "The state and federal governments are not such separate entities, either legally or in fact, that one cannot call upon the other to help to achieve, in the public interest, a result that they both desire."

First, Pacific's attack upon that part of the Commission's order which pertains to the hatchery facilities [6] goes only to the sufficiency of the evidence and findings; there is no contention that the Commission lacks statutory authority to impose the requirements it did.

Pacific further claims that the court below abridged its rights under the settlement agreement with the Department by holding (a) that under the agreement Pacific was not relieved of any obligation to pay the operating expenses of the hatchery and (b) that despite the State's agreement to pay for maintenance and operation of the egg-taking facility, the Commission might impose that burden on Pacific if it found sound reasons for doing so. The question of contract construction—a question to which the Commission did not address itself in the order—is not of sufficient moment to warrant consideration by this

[6] Pacific's cross-petition for certiorari appears to object not to the requirement that it construct a hatchery, but rather to its being required to "convey" it to the State. But, as the court below properly stated (Pac. Pet. App. pp. 9–10), its present apparent contention that it should operate the hatchery was never made before the Commission and no evidence was presented as to Pacific's willingness or ability to conduct such operation in the public interest. Therefore, the contention may not be considered on judicial review (see Section 313(b) of the Federal Power Act, 16 U.S.C. § 825*l*(b); *Wisconsin v. Federal Power Commission*, 373 U.S. 294, 307; *Sunray Mid-Continent Oil Co.* v. *Federal Power Commission*, 364 U.S. 137, 157; *Federal Power Commission* v. *Colorado Interstate Gas Co.*, 348 U.S. 492, 498; *Panhandle Eastern Pipe Line Co.* v. *Federal Power Commission*, 324 U.S. 635, 647, 650–651).

Court.[7] And as to the contention that "neither the Court of Appeals nor the Commission is free to set aside Pacific's rights acquired by contract" (Pac. Pet. p. 12), the short answer is that in performing its statutory duties in the public interest, a federal administrative agency is not bound or restricted by the private contracts of parties appearing before it. *National Licorice Co.* v. *National Labor Relations Board,* 309 U.S. 350, 363. And the rule is no different where one of the parties to the contract is a State, since the Federal Power Act entrusts the protection of the public interest, including that of the citizens of California, to the Federal Power Commission. *Federal Power Commission* v. *Oregon,* 349 U.S. 435, 449; *First Iowa Hydro-Electric Cooperative* v. *Federal Power Commission,* 328 U.S. 152, 182.

Finally, there is no merit to the contention (Pac. Pet. pp. 3, 7, 12–13) that the court below "invited" the Commission to "alter" its order requiring Pacific to reimburse the Department for 80% of the annual cost of operation and maintenance of the fish hatchery, and thereby invaded the Commission's administrative discretion. The court merely asked the Commission to clarify a provision which it believed to be ambiguous. Whether or not this particular provision of this particular order was in fact ambiguous is scarcely a question calling for review by this Court.

[7] If Pacific were correct in its view that the contract relieves it of liability for the expenses of operating the hatchery, the Commission would be confronted with the same question as to the hatchery which now faces it as to egg-taking facilities—whether sound reasons exist for requiring Pacific to pay the operating costs even though the contract imposes that burden on the State.

CONCLUSION

The decision below is not ripe for review and, in any event, the case involves no substantial questions warranting review by this Court.

For these reasons, both petitions should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

October Term, 1964
Nos. 648 and 659

No. 648

DEPARTMENT OF FISH AND GAME OF THE STATE OF CALIFORNIA,

Petitioner,

vs.

FEDERAL POWER COMMISSION, PACIFIC POWER & LIGHT CO.,

Respondents.

No. 569

PACIFIC POWER & LIGHT CO.,

Petitioner,

vs.

FEDERAL POWER COMMISSION,

Respondent.

Reply Brief of Department of Fish and Game of the State of California, Petitioner (No. 648).

Argument.

1. No further proceedings before the Federal Power Commission (hereinafter "Commission") are required to make the issues tendered by the petition of the Department of Fish and Game of the State of California (hereinafter "Department") presently ripe for consideration by this Court.[1] Should the Court agree with us that the Commission should have ordered Pacific

[1]This Court, with its plenary jurisdiction over lower federal courts, has the power to review a decision of the federal Court of Appeals that might not be final for the purposes of permitting review by this Court had the decision come up from a state court. See Stern and Gressman, *Supreme Court Practice* 18-19 (3d. ed. 1962).

Power & Light Co. (hereinafter "Licensee") to bear all operation and maintenance costs for all fishery facilities at Iron Gate, then no further proceedings before the Commission will be required.

We contend, in part, that the Department by a 1959 agreement with Pacific did not agree to bear operation and maintenance costs for the fish trapping and egg collecting facilities, so that the question of who should bear those costs was left open for the Commission's later determination. In contrast to the Commission's present assertion that "the Commission itself did not undertake to construe that agreement" (FPC Brief, p. 8,n.3), we are now simply asking this Court to affirm in that respect the Commission's own construction of that 1959 agreement as not precluding the question of who should bear operation and maintenance costs. See Dept. Pet. App., pp. 34A,n.18, 38A (art. 50(C)), and 48A (last full par.); *cf.* p. 16A.

But even if the Court should disagree with us and the Commission as to the proper construction of the 1959 agreement on this question, the issue of the burden of the operation and maintenance costs for the fish hatchery facilities would still have to be decided. Nothing the Commission may hereafter decide can make that issue disappear.

Hence, further proceedings before the Commission, if any, will not erase the necessity of the Court's deciding the important issues raised by our petition relating to significant recreational resources and commercial potentials of many rivers in California and in other states.[2]

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[2]In footnote 12, p. 17, of our petition, where we list the major salmon producing streams in California, we inadvertently omitted the Sacramento River. Anadromous fish can be, of course, an important commercial as well as recreational resource.

2. Our position that Licensee must be required to bear all operation and maintenance costs for all fishery facilities at Iron Gate would *not,* if carried to its logical conclusion "mean that an application for an FPC license must be denied unless the applicant is willing to construct and maintain flood control, navigation, recreation and/or other facilities, even if the costs involved might exceed by many times the advantages of the power project", as the Commission now contends (FPC Brief, p. 9). The Commission's contention misconceives its own decision and misconstrues our position.

In the pending case, the Commission has already impliedly determined, by ordering their construction, that the fishery facilities in question are required for comprehensive development under section 10(a) of the Federal Power Act. The 20 percent of operation and maintenance costs for those facilities that the Commission would impose upon the Department and that we say should be borne by Licensee (so that Licensee would bear 100 percent) would amount according to the Commission's own figures to "no more than approximately $10,000 a year" (FPC Brief, p. 11). Since Iron Gate is a multimillion dollar project (Dept. Pet. App., p. 43A), it cannot rationally be argued, nor does the Commission contend (as we noted in our petition, p. 16) that imposition of this additional 20 percent upon Licensee would render the project infeasible.

Even if Iron Gate would improve the fishery resource of the Klamath River (a determination not supported by one iota of evidence in the record), section 10(a) of the Federal Power Act expressly provides that the Commission must require of its licensee a plan best adapted to

"improving or developing" the waterway. In this context, therefore, the "gift horse" that the Commission's brief would attribute to the Department (FPC Brief, p. 11,n.4) would seem to belong to the Licensee. But this is a gift that the Commission has no authority to give to Licensee, and certain not at the expense of the State of California.

Conclusion.

The petition for a writ of certiorari of the Department (No. 648) should be granted.

The conditional cross-petition of Licensee (No. 659) should be denied.

Dated: December 18, 1964

Respectfully submitted,

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